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ADVANCE SHEETS

OF

CASES

ARGUED AND DETERMINED IN THE

COURT OF APPEALS

OF

NORTH CAROLINA

DECEMBER 29, 2021

MAILING ADDRESS: The Judicial Department
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OF
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COURT OF APPEALS

CASES REPORTED

FILED 15 JUNE 2021

CASES REPORTED WITHOUT PUBLISHED OPINIONS

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N.C. COURT OF APPEALS
2022 SCHEDULE FOR HEARING APPEALS

Cases for argument will be calendared during the following weeks:

January	10 and 24
February	7 and 21
March	7 and 21
April	4 and 25
May	9 and 23
June	6
August	8 and 22
September	5 and 19
October	3, 17, and 31
November	14 and 28
December	None (unless needed)

Opinions will be filed on the first and third Tuesdays of each month.

CASES

ARGUED AND DETERMINED IN THE

COURT OF APPEALS

OF

NORTH CAROLINA

AT

RALEIGH

LAWRENCE BENIGNO, PLAINTIFF

v.

SUMNER CONSTRUCTION, INC. AND JAMES A. RIGGAN, JR., DEFENDANTS

No. COA20-321

Filed 15 June 2021

1. Contracts—real property—offer to purchase and contract—plain and unambiguous terms—acceptance of property

In a dispute concerning the location of a fence around plaintiff's personal residence, the trial court did not err in dismissing plaintiff's breach of contract claim against defendant builder, with whom plaintiff had contracted for the purchase of the newly constructed residence and the addition of the fence "surrounding property lines." The plain and unambiguous language of the offer to purchase and contract stated that closing would constitute acceptance of the property in its then-existing condition unless otherwise provided in writing; therefore, by closing on the property, plaintiff accepted the property in its existing condition and could not successfully pursue a breach of contract claim based on the placement of the fence.

2. Construction Claims—negligent construction—location of fence—statute of limitations—latent defect

In a dispute concerning the location of a fence around plaintiff's personal residence, the trial court erred in dismissing plaintiff's negligent construction claim against defendant subcontractor, who had installed the fence around the newly constructed residence, as time-barred by the statute of limitations. Judgment on the pleadings was improper because the pleadings raised a question of fact as to

when the improper installation of the fence—which was supposed to be installed "surrounding property lines"—ought reasonably to have become apparent.

Judge TYSON concurring in part and dissenting in part.

Appeal by Plaintiff from Order entered 31 January 2020 by Judge Debra A. Sasser in Wake County District Court. Heard in the Court of Appeals 12 January 2021.

Ryan Hayden Smith for plaintiff-appellant.

Howard, Stallings, From, Atkins Angell & Davis, P.A., by Brian E. Moore, for defendants-appellees.

MURPHY, Judge.

¶ 1 Plaintiff Lawrence Benigno ("Benigno") appeals a judgment dismissing his claims against Defendants Sumner Construction, Inc. ("Sumner") and James Riggan, Jr. ("Riggan") (collectively, "Defendants"). Benigno contends the trial court erred in granting *Defendants' Motion for Judgment on the Pleadings* because his breach of contract claim is not waived by the "as-is" provision in the Offer to Purchase and Contract; the implied warranty of workman-like quality requires his breach of contract claim be referred to a factfinder; and his negligent construction claim is not barred by the applicable statute of limitations, N.C.G.S. § 1-52(16).

¶ 2 Although we conclude the trial court did not err in dismissing Benigno's breach of contract claim, we are persuaded the trial court erred in dismissing Benigno's negligent construction claim as the statute of limitations may not bar the claim. We affirm the trial court's ruling dismissing Benigno's claim for breach of contract, reverse the portion of the order dismissing Benigno's negligent construction claim and remand to the trial court for further proceedings not inconsistent with this opinion.

BACKGROUND

¶ 3 On 14 May 2015, Benigno entered into a contract with Sumner for the purchase of a newly constructed residence located in Youngsville. Among other things, the contract consisted of a Standard Form 2-T "Offer to Purchase and Contract" ("the Agreement") and a Standard Form 2A3-T "New Construction Addendum" ("the Addendum"). The

Agreement provided "CLOSING SHALL CONSTITUTE ACCEPTANCE OF THE PROPERTY IN ITS THEN EXISTING CONDITION UNLESS PROVISION IS OTHERWISE MADE IN WRITING." Additionally, the Addendum stated Sumner would "[a]dd [a] Black Aluminum fence with [a] 5 foot gate in [the] back yard[,] surrounding property lines . . . ." Sumner hired Riggan as a subcontractor to install the fence, which was completed at or around the closing date. Benigno closed on the property on 1 July 2015.

¶ 4 During spring of 2019, Benigno's neighbor erected a fence along the neighbor's property line. The addition of the neighbor's fence created a gap between Benigno's fence and the neighbor's fence. At this point, Benigno realized his fence was not built "surrounding property lines" and was informed by Sumner (acting as the HOA architectural committee) he was responsible for maintaining the gap between the two fences.

¶ 5 In response, Benigno filed suit against Sumner alleging breach of contract and against Riggan alleging negligent construction. Defendants filed a motion for judgment on the pleadings, arguing in pertinent part:

> 2. [Benigno's] claim for breach of contract should be dismissed because, as alleged in the Complaint, Defendant Sumner installed a fence at the property prior to closing in accordance with the terms of the [Agreement] which was accepted by [Benigno] at closing and for four years thereafter without objection. The [Agreement] expressly provides that [Benigno] is accepting the property "as is."
>
> . . . .
>
> 4. As alleged in [Benigno's] Complaint, the fence was completed and closing occurred on [15 July 2015] and as such [Benigno's] claim against Defendant Riggan for negligent construction is barred by the statute of limitations.

After a hearing, the trial court granted Defendants' motion, ruling "[i]t appears from the pleadings that no material issue of fact remains to be resolved and that Defendants are entitled to an order dismissing [Benigno's] claims." Benigno timely appealed.

ANALYSIS

¶ 6 The ultimate issue on appeal is whether the trial court erred in granting *Defendants' Motion for Judgment on the Pleadings*. "This Court

reviews a trial court's grant of a motion for judgment on the pleadings *de novo*." *Carpenter v. Carpenter*, 189 N.C. App. 755, 757, 659 S.E.2d 762, 764 (2008).

¶ 7 Pursuant to Rule 12(c) of the North Carolina Rules of Civil Procedure, "[a]fter the pleadings are closed but within such time as not to delay the trial, any party may move for judgment on the pleadings." N.C.G.S. § 1A-1, Rule 12(c) (2019). In determining whether to grant a motion for judgment on the pleadings,

> [t]he trial court is required to view the facts and permissible inferences in the light most favorable to the nonmoving party. All well pleaded factual allegations in the nonmoving party's pleadings are taken as true and all contravening assertions in the movant's pleadings are taken as false. All allegations in the nonmovant's pleadings, except conclusions of law, legally impossible facts, and matters not admissible in evidence at the trial, are deemed admitted by the movant for purposes of the motion.

Ragsdale v. Kennedy, 286 N.C. 130, 137, 209 S.E.2d 494, 499 (1974) (citations omitted).

¶ 8 The function of Rule 12(c) "is to dispose of baseless claims or defenses when the formal pleadings reveal their lack of merit. A motion for judgment on the pleadings is the proper procedure when all the material allegations of fact are admitted in the pleadings and only questions of law remain." *Id.* "Judgments on the pleadings are disfavored in law[.]" *Groves v. Cmty. Hous. Corp.*, 144 N.C. App. 79, 87, 548 S.E.2d 535, 540 (2001).

A. Breach of Contract Claim

1. "As-Is" Provision in the Agreement

¶ 9 **[1]** In *Defendants' Motion for Judgment on the Pleadings*, Defendants argue:

> [Benigno's] claim for breach of contract should be dismissed because, as alleged in the Complaint, Defendant Sumner installed a fence at the property prior to closing in accordance with the terms of the [Agreement] which was accepted by [Benigno] at closing and for four years thereafter without objection. The [Agreement] expressly provides that [Benigno] is accepting the property "as is."

¶ 10 "Interpreting a contract requires the court to examine the language of the contract itself[.]" *State v. Philip Morris USA, Inc.*, 363 N.C. 623, 631, 685 S.E.2d 85, 90 (2009). When the terms of a contract are "plain and unambiguous, there is no room for construction. The contract is to be interpreted as written." *Jones v. Casstevens*, 222 N.C. 411, 413, 23 S.E.2d 303, 305 (1942).

¶ 11 The plain and unambiguous language of the Agreement states, in relevant part: "CLOSING SHALL CONSTITUTE ACCEPTANCE OF THE PROPERTY IN ITS THEN EXISTING CONDITION UNLESS PROVISION IS OTHERWISE MADE IN WRITING." Since Benigno proceeded to closing, he agreed to accept the property in its current condition under the express terms of the Agreement. Pursuant to the Agreement, he could not thereafter claim Sumner's improvements to the property prior to the closing were inadequate. By executing this provision interpreted as it is written, Benigno cannot successfully pursue a breach of contract claim based on a defective condition of the property. The trial court properly concluded "Defendants are entitled to an order dismissing [Benigno's] claim[]" for breach of contract.

2. Implied Warranty of Workman-Like Quality

¶ 12 Benigno also argues that because every contract for the sale of a recently constructed dwelling contains an implied warranty of workman-like quality, the breach of contract claim must be referred to a factfinder. However, Benigno has failed to preserve this argument for our review.

¶ 13 Where "[t]he record does not contain anything in the pleadings, transcripts, or otherwise, to indicate that [an] issue . . . was presented to the trial court[,] . . . we refuse to address the issue for the first time on appeal." *Bell v. Nationwide Ins. Co.*, 146 N.C. App. 725, 728, 554 S.E.2d 399, 402 (2001). Here, the Record does not contain anything in the pleadings,[1] transcripts, or otherwise to indicate the issue of the implied warranty of workman-like quality was presented to the trial court. We decline to review Benigno's argument regarding the implied warranty of workman-like quality. *See Domingue v. Nehemiah II, Inc.*, 208 N.C. App. 429, 435, 703 S.E.2d 462, 466 (2010) (declining to review the plaintiff's breach of implied warranty of habitability argument when the complaint and the transcript of the motion to dismiss hearing revealed this theory of relief was not raised by the plaintiff or addressed by the trial court).

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1. We note Benigno's complaint does not mention the implied warranty of workman-like quality.

B. Negligent Construction Claim

¶ 14 **[2]** Finally, Benigno argues the trial court erred in granting *Defendant's Motion for Judgment on the Pleadings* and dismissing the negligent construction claim, contending the matter should have been referred to a finder of fact because the applicable statute of limitations, N.C.G.S. § 1-52(16), does not bar the negligent construction claim.

¶ 15 Benigno contends his negligent construction claim accrued on or about 20 March 2019, when he received actual notice of the improper installation of the fence, and therefore the statute of limitations does not bar his claim. Riggan argues Benigno's claim accrued on 1 July 2015, when the improper installation of the fence ought reasonably to have become apparent to Benigno, and the statute of limitations bars Benigno's claim.

¶ 16 The applicable statute of limitations for claims involving negligence for personal injury or physical damage to a claimant's property[2] is three years, which "shall not accrue until bodily harm to the claimant or physical damage to his property becomes apparent or ought reasonably to have become apparent to the claimant, whichever event first occurs." N.C.G.S. § 1-52(16) (2019). "The primary purpose of [N.C.G.S.] § 1-52(16) is that it is intended to apply to plaintiffs with latent injuries." *Robertson v. City of High Point*, 129 N.C. App. 88, 91, 497 S.E.2d 300, 302, *disc. rev. denied*, 348 N.C. 500, 510 S.E.2d 654 (1998). In the case of a latent injury, N.C.G.S. § 1-52(16) "requires discovery of physical damage before a cause of action can accrue." *McCarver v. Blythe*, 147 N.C. App. 496, 499, 555 S.E.2d 680, 683 (2001). "[O]nce some physical damage has been discovered, . . . the injury springs into existence and completes the cause of action." *Id.* A central question in this case is whether the improper installation of the fence might constitute a latent defect in order to determine when Benigno's cause of action accrued.

¶ 17 A latent defect is a defect which is not "obvious or discoverable upon a reasonable inspection by the plaintiff[] . . . ." *Oates v. JAG, Inc.*, 314 N.C. 276, 281, 333 S.E.2d 222, 226 (1985). In *Oates*, the defects in the plaintiff's home consisted of

> the installation of a drain pipe which had been cut, the failure to use grade-marked lumber, the failure to comply with specific provisions of the North Carolina Uniform Residential Building Code pertaining to

2. Whether "physical damage" has occurred to Benigno's property is not in dispute in this appeal.

> certain weight bearing requirements, improper and insufficient nailing on bridging and beams, and faulty and shoddy workmanship.

Id. at 277, 333 S.E.2d at 224. Our Supreme Court held these defects were latent because they were "of such a nature that . . . they would not ordinarily be discovered by a purchaser during a reasonable inspection." *Id.* at 281-82, 333 S.E.2d at 226.

¶ 18 At the hearing, Riggan argued the location of the fence was not a latent defect because it could be easily discovered by a routine property survey:

> [T]his is not a latent defect[.] It's a fence. It was visible. [Benigno] . . . contend[s] it's too far off the property line . . . . [T]hat kind of issue could easily be discovered with a survey, which is a routine thing that is done or should be done in any residential purchase of real estate.

We disagree with the absoluteness of Riggan's logic—primarily because at this preliminary stage of the litigation, it is not supported by the allegations and admissions in the pleadings to support entry of judgment on the pleadings.

¶ 19 "Whether a cause of action is barred by the statute of limitations is a mixed question of law and fact." *Jack H. Winslow Farms, Inc. v. Dedmon*, 171 N.C. App. 754, 756, 615 S.E.2d 41, 43, *disc. rev. denied*, 360 N.C. 64, 621 S.E.2d 625 (2005). "[W]hen the bar is properly pleaded and the facts are admitted or are not in conflict, the question of whether the action is barred becomes a question of law, and [judgment on the pleadings] is appropriate." *Id.* However, "[w]hen the evidence is sufficient to support an inference that the limitations period has not expired," judgment on the pleadings is premature. *Everts v. Parkinson*, 147 N.C. App. 315, 319, 555 S.E.2d 667, 670 (2001). Indeed, the need for a land survey may even suggest to the factfinder that the exact location of the fence is not "obvious or discoverable upon a reasonable inspection by [Benigno]" and that the location of the fence "would not ordinarily be discovered by a purchaser during a reasonable inspection." *Oates*, 314 N.C. at 281-82, 333 S.E.2d at 226. At a minimum, development of an evidentiary record in this case is necessary to resolve this question. Ultimately, we hold on the Record before us at this stage of the litigation, the improper location of the fence may be a latent defect and, as such, Riggan is not entitled to judgment on the pleadings.

¶ 20 As Benigno suffers a potentially latent injury, he must have "discover[ed] [] physical damage before a cause of action can accrue."

McCarver, 147 N.C. App. at 499, 555 S.E.2d at 683. Taking the allegations in the complaint as true, Benigno reasonably discovered the physical damage upon the installation of his neighbor's fence, on or about 20 March 2019. Benigno's cause of action may have accrued on 20 March 2019 and the three-year statute of limitations may have begun to run on that date. Benigno brought suit on 9 October 2019, less than seven months after he discovered the physical damage. The statute of limitations does not necessarily bar Benigno's negligent construction claim.

¶ 21 "A motion for judgment on the pleadings is the proper procedure when all the material allegations of fact are admitted in the pleadings and only questions of law remain. When the pleadings do not resolve all the factual issues, judgment on the pleadings is generally inappropriate." *Ragsdale*, 286 N.C. at 137, 209 S.E.2d at 499. "Judgments on the pleadings are disfavored in law, and the trial court must view the facts and permissible inferences in the light most favorable to the non-moving party." *Groves*, 144 N.C. App. at 87, 548 S.E.2d at 540 (citing *Flexolite Elec., Ltd. v. Gilliam*, 55 N.C. App. 86, 88, 284 S.E.2d 523, 524 (1981)). "A judgment on the pleadings in favor of a defendant who asserts the statute of limitations as a bar is proper when, and only when, all the facts necessary to establish the limitation are alleged or admitted." *Id.*

¶ 22 Here, Benigno alleged in his complaint, in pertinent part:

> 13. The fence appeared to [Benigno] to be properly installed at his property line. There was nothing to indicate to [Benigno] nor did anyone advise [Benigno] that the fence would be located anywhere other than at the property line.
>
> 14. Since closing [Benigno] maintained the property within the fence.
>
> 15. [Benigno's] neighbor to the east had maintained the yard up to the fence until he installed a plastic barrier around the spring of 2019.
>
> 16. When he did this, an uneven and excessive gap between that neighbor's property line and [Benigno's] fence was exposed. [] Sumner approached [Benigno] and told him he needed to maintain that property. It was at this point that [Benigno] realized that his fence was not installed "surrounding" his property.
>
> . . . .

> 26. This issue was latent and could not have been discovered by [Benigno] through a normal inspection.

¶ 23 In their *Answer*, Defendants responded to these allegations:

> 13. The allegations of paragraph 13 are denied.
>
> 14. The allegations of paragraph 14 are admitted upon information and belief.
>
> 15. Defendants are without information sufficient to form an opinion as to the truth or falsity of the allegations of paragraph 15 and therefore the same are denied.
>
> 16. It is admitted that [] Sumner informed [Benigno] that he needed to maintain his property. It is further admitted that [] [Benigno's] neighbor installed a fence. Except as expressly admitted herein, the allegations of paragraph 16 are denied.
>
> . . . .
>
> 26. The allegations of paragraph 26 are denied.

¶ 24 In substance, Benigno has alleged, and Riggan denied, the allegedly negligent construction of the fence was not "apparent or ought reasonably to have become apparent" until Benigno's neighbor began construction of the neighboring fence in the spring of 2019 for purposes of the statute of limitations. N.C.G.S. § 1-52(16) (2019). The pleadings simply raise issues of fact rendering disposition of Benigno's negligent construction claim via judgment on the pleadings premature.

¶ 25 Benigno's allegations are sufficient to support an inference that the limitations period has not expired and, as such, Riggan is not entitled to judgment on the pleadings. The trial court erred in dismissing Benigno's negligent construction claim.

CONCLUSION

¶ 26 The trial court did not err in dismissing Benigno's claim for breach of contract as Defendants were entitled to judgment as a matter of law as to the "as-is" provision in the Agreement.

¶ 27 The trial court erred in dismissing Benigno's claim for negligent construction as the applicable statute of limitations may not have run at the time the complaint was filed. The portion of the order granting *Defendants' Motion for Judgment on the Pleadings* in regard to

Benigno's negligent construction claim against Riggan is reversed and remanded to the trial court for further proceedings not inconsistent with this opinion.

AFFIRMED IN PART; REVERSED IN PART AND REMANDED.

Judge HAMPSON concurs.

Judge TYSON concurs in part and dissents in part with separate opinion.

TYSON, Judge, concurring in part, dissenting in part.

¶ 28 I concur with the majority's opinion concluding the trial court properly dismissed Benigno's breach of contract and implied warranty claims and affirming that portion of the order. The majority's opinion erroneously concludes the trial court erred in dismissing the negligent construction claim. I vote to affirm the trial court's order in its entirety. I concur in part and respectfully dissent in part.

I. Breach of Contract

¶ 29 Our Supreme Court stated: "A motion for judgment on the pleadings is the proper procedure when all the material allegations of fact are admitted in the pleadings and only questions of law remain." *Ragsdale v. Kennedy*, 286 N.C. 130, 137, 209 S.E.2d 494, 499 (1974). Plaintiff accepted the property "as-is" at closing and did not timely raise an express breach and did not assert implied warranty of workman-like quality in his complaint. We all agree Defendants are entitled to judgment as a matter of law to enforce the "as is" provision in the Agreement and for Benigno's failure to assert other claims.

¶ 30 Riggan argues all of Benigno's claims accrued on 1 July 2015, when the improper installation of the fence ought reasonably to have become apparent to Benigno, and he asserts the three-years statute of limitations bars Benigno's claims. Riggan asserts the fence's location is not a latent defect. The true location could be easily discovered by a routine property survey or Benigno could and should have verified the boundaries of his own property within the timelines of the statute of limitations.

¶ 31 The statute of limitations is three years for claims involving negligence for personal injury or physical damage to a claimant's property, which "shall not accrue until bodily harm to the claimant or physical damage to his property becomes apparent or *ought reasonably to have*

become apparent to the claimant, whichever event first occurs." N.C. Gen. Stat. § 1-52(16) (Interim Supp. 2020) (emphasis supplied).

¶ 32 This Court stated "[w]hether a cause of action is barred by the statute of limitations is a mixed question of law and fact." *Jack H. Winslow Farms, Inc. v. Dedmon*, 171 N.C. App. 754, 756, 615 S.E.2d 41, 43, *disc. rev. denied*, 360 N.C. 64, 621 S.E.2d 625 (2005). "[W]hen the bar is properly pleaded and the facts are admitted or are not in conflict, the question of whether the action is barred becomes a question of law, and [the trial court's Rule 12(c) judgment on the pleadings] is appropriate." *Id.*

II. Negligent Construction Claim

¶ 33 As the majority's opinion states, a latent defect is a defect which is not "obvious or discoverable upon a reasonable inspection by the plaintiff[]." *Oates v. JAG, Inc.*, 314 N.C. 276, 281, 333 S.E.2d 222, 226 (1985) (citation omitted). In *Oates*, our Supreme Court held the damaged pipe, lumber and code violations were latent defects because they were "of such a nature that a jury could find they would not ordinarily be discovered by a purchaser *during a reasonable inspection*." *Id.* at 281-82, 333 S.E.2d at 226 (emphasis supplied).

¶ 34 In the trial court, Riggan argues:

> [T]his is not a latent defect. . . . It's a fence. It was visible . . . [Benigno] . . . contend[s] it's too far off the property line . . . . [T]hat kind of issue could easily be discovered with a survey, which is a routine thing that is done or should be done in any residential purchase of real estate.

¶ 35 I agree with Riggan that a fence is both clearly visible, and any purported defect in its location was easily discoverable by the owner, with or without a survey. It is not a hidden or latent defect that was not visibly apparent "*during a reasonable inspection*." *Id.* The location of the neighbor's fence may or may not be located exactly on their property line. In any event, Benigno cannot rely upon his neighbor's actions or non-actions to be the triggering event to put Benigno on notice of an alleged defect to toll the accrual and running of the statute. N.C. Gen. Stat. § 1-52(16).

¶ 36 The trial court properly dismissed Benigno's claim for negligent construction. He failed to show any latent or hidden defect, which delayed accrual of the three-year statute of limitations to toll the running until his neighbor's actions of installing their fence. The neighbor's actions are not a triggering event to toll the statute of limitations, not dispositive

of the location of Benigno's property line nor the proper placement of his fence. I vote to affirm the trial court's judgment on the pleadings in its entirety.

III. Conclusion

¶ 37 Plaintiff purchased the property "as-is" and failed to bring any breach of contract action within the statute of limitations. Plaintiff also failed to bring the negligent construction claim within the applicable statute of limitations. Any alleged defect is not a latent defect and is not shown by Plaintiff's neighbor's actions. The trial court correctly dismissed all of Plaintiff's claims. I concur in part and respectfully dissent in part.

CHARLES B. CLINE AND WIFE, DANIELLE C. CLINE, PLAINTIFFS
v.
JAMES BANE HOME BUILDING, LLC; JAMES BANE, INDIVIDUALLY; CURTIS HOPPER, IN HIS INDIVIDUAL CAPACITY AS AN INSPECTOR FOR GASTON COUNTY HEALTH DEPARTMENT; GASTON COUNTY, NORTH CAROLINA; LACHELLE CROSBY AND HOME BUYERS MARKETING, II, INC., DEFENDANTS

No. COA20-422

Filed 15 June 2021

1. Appeal and Error—interlocutory orders—granting defense of governmental immunity—substantial right

An interlocutory order granting a motion for summary judgment on the basis of governmental immunity affected a substantial right, and appeal of the order was properly before the Court of Appeals.

2. Immunity—governmental—insurance coverage—summary judgment

The trial court properly entered summary judgment in favor of county defendants on the basis of governmental immunity where the county defendants' motion relied on discovery responses and plaintiffs, the non-moving party, failed to produce the disputed insurance contract to create a genuine issue of material fact as to whether the county waived governmental immunity to the extent of its insurance coverage.

3. Immunity—public officials—county environmental health administrator—not created by statute

A county environmental health administrator who was sued in his individual capacity for his negligent approval of a septic system permit was a public employee, not a public official, because his position was not created by statute, and therefore he was not protected by public official's immunity.

Appeal by Plaintiffs from order entered 19 March 2020 by Judge Kevin M. Bridges in Gaston County Superior Court. Heard in the Court of Appeals 9 February 2021.

Devore, Acton & Stafford, P.A., by Fred W. DeVore, III and Brittany N. Conner, for plaintiffs-appellants.

The Law Office of Martha R. Thompson, by Martha Raymond Thompson, for defendants-appellees.

MURPHY, Judge.

¶ 1 Unless waived, a county and its employees acting in their official capacities are protected from tort actions under the doctrine of governmental immunity. Likewise, the doctrine of public official's immunity protects a public official, when sued in his or her individual capacity, from actions for mere negligence in the performance of their duties. However, this immunity does not exist for public employees.

¶ 2 Here, the trial court did not err in granting summary judgment in favor of Gaston County and Curtis Hopper, in his official capacity, based on governmental immunity. However, the trial court erred in granting summary judgment in favor of Curtis Hopper, in his individual capacity, based on public official's immunity since he is a public employee. We affirm in part the trial court's judgment insofar as its ruling is based on governmental immunity, but reverse in part the trial court's decision to grant summary judgment on the basis of public official's immunity.

BACKGROUND

¶ 3 On 12 February 2016, Plaintiffs-Appellants Charles and Danielle Cline ("the Clines") closed on a newly constructed home from non-appealing Defendant James Bane Home Building, LLC ("Bane Homes"). The Clines' home is located in Gaston County and is serviced by a septic system. Curtis Hopper ("Hopper"), a Gaston County Environmental Health

Administrator, had previously approved a septic system permit classified as "provisionally suitable."[1] Within a few months of moving into the home, the Clines started to observe raw sewage bubbling in the yard and running down the driveway. To determine the source and cause of the raw sewage, the Clines hired an expert who opined that the septic system, as constructed, was undersized and insufficient for the size of the home.

¶ 4 The Clines sued Bane Homes and James Bane in his individual capacity for breach of contract and breach of implied warranty of habitability; Bane Homes for rescission; James Bane in his individual capacity for negligence; Hopper, in his individual capacity and official capacity, and Gaston County for negligence; LaChelle Crosby, the real estate agent who marketed the home, for negligence and misrepresentation; and LaChelle Crosby and Home Buyers Marketing, II, Inc. for unfair and deceptive trade practices.[2] Following discovery, Appellees filed a motion for summary judgment, arguing they were entitled to governmental immunity and public official's immunity.[3] In its order filed 19 March 2020 ("Order"), the trial court granted Appellees' motion for summary judgment, ordering "Defendants Gaston County and Curtis Hopper are entitled to judgment as a matter of law on the bases of governmental immunity and public official[']s immunity." The Clines timely appealed the Order. Bane Homes, James Bane, LaChelle Crosby, and Home Buyers Marketing, II, Inc. remain Defendants in the case and did not appeal the Order.

ANALYSIS

¶ 5 Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact

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1. "Provisionally suitable" is one of several choices of soil suitability and these sites "may be utilized for a ground absorption sewage treatment and disposal system." 15A N.C. Admin. Code § 18A.1948(b) (2019). "Sites classified [p]rovisionally [s]uitable require some modifications and careful planning, design, and installation in order for a ground absorption sewage treatment and disposal system to function satisfactorily." *Id.*

2. This appeal involves only the negligence claims against Hopper, in both his individual and official capacity, and Gaston County. When referring to Hopper and Gaston County collectively, the term "Appellees" will be used to avoid referring to any Defendants that are not the subject of this appeal.

3. Public official's immunity is also referred to as "public officers' immunity" and the two terms are interchangeable. *See e.g.*, *Schlossberg v. Goins*, 141 N.C. App. 436, 445, 540 S.E.2d 49, 56 (2000), *disc. rev. denied*, 355 N.C. 215, 560 S.E.2d 136 (2002) (referring to "public officers' immunity"); *Summey v. Barker*, 142 N.C. App. 688, 689, 544 S.E.2d 262, 264 (2001) (referring to "public official's immunity").

and that any party is entitled to a judgment as a matter of law." N.C.G.S. § 1A-1, Rule 56(c) (2019). When considering a summary judgment motion, "all inferences of fact . . . must be drawn against the movant and in favor of the party opposing the motion." *Caldwell v. Deese*, 288 N.C. 375, 378, 218 S.E.2d 379, 381 (1975).

¶ 6 We review a trial court's order granting summary judgment de novo. *See Builders Mut. Ins. Co. v. N. Main Constr. Ltd.*, 361 N.C. 85, 88, 637 S.E.2d 528, 530 (2006). "Under a *de novo* review, [we] consider[] the matter anew and freely substitute[] [our] own judgment" for that of the lower tribunal. *In re Greens of Pine Glen Ltd.*, 356 N.C. 642, 647, 576 S.E.2d 316, 319 (2003). "The showing required for summary judgment may be accomplished by proving an essential element of the opposing party's claim . . . would be barred by an affirmative defense . . . ." *Dobson v. Harris*, 352 N.C. 77, 83, 530 S.E.2d 829, 835 (2000).

A. Jurisdiction

1. Subject Matter Jurisdiction

¶ 7 Hopper argues we do not have subject matter jurisdiction over the claims against him, in either capacity, because subject matter jurisdiction over his alleged acts of negligence is vested exclusively in the Industrial Commission pursuant to the State Tort Claims Act, N.C.G.S. Chapter 143, Article 31. We disagree.

¶ 8 In *Meyer v. Walls*, our Supreme Court decided "whether jurisdiction for [a] suit against [Buncombe County Department of Social Services lied] before the Industrial Commission pursuant to the Tort Claims Act or before the Superior Court as originally filed by [the] plaintiff." *Meyer v. Walls*, 347 N.C. 97, 104, 489 S.E.2d 880, 884 (1997). Our Supreme Court held "the Tort Claims Act applies only to actions against state departments, institutions, and agencies and does not apply to claims against officers, employees, involuntary servants, and agents of the State." *Id.* at 107-08, 489 S.E.2d at 885-86. Our Supreme Court also explicitly overruled *Robinette v. Barriger*, which held "Alexander County Health Department is a state agency, rather than a county agency, and that because the Industrial Commission has exclusive jurisdiction of negligence actions against the State, the trial court did not err in granting summary judgment for the county based on a lack of subject matter jurisdiction." *Id.* at 107, 489 S.E.2d at 886 (citing *Robinette v. Barriger*, 116 N.C. App. 197, 447 S.E.2d 498 (1994)). Our Supreme Court ultimately concluded "the Tort Claims Act does not apply to the claim against Buncombe County [Department of Social Services]." *Id.* at 107-08, 489

S.E.2d at 885-86. We similarly hold Gaston County's health department is not a state agency or institution.

¶ 9 Here, Hopper was acting as an agent for Gaston County's health department, which is not a state department, or institution, but rather a county agency. The Industrial Commission does not have exclusive jurisdiction over his alleged acts of negligence, and both the trial court and this Court have subject matter jurisdiction.

2. Appellate Jurisdiction

¶ 10 **[1]** Appellees argue this appeal "should be dismissed as an improper interlocutory appeal as there are insufficient grounds for appellate review." We disagree.

¶ 11 "An interlocutory order is one made during the pendency of an action, which does not dispose of the case, but leaves it for further action by the trial court in order to settle and determine the entire controversy." *Veazey v. City of Durham*, 231 N.C. 357, 362, 57 S.E.2d 377, 381 (1950). In contrast, "[a] final judgment is one which disposes of the cause as to all the parties, leaving nothing to be judicially determined between them in the trial court." *Id.* at 361-62, 57 S.E.2d at 381. "[T]he entry of summary judgment for fewer than all defendants is not a final judgment[,]" but rather an interlocutory judgment. *Long v. Giles*, 123 N.C. App. 150, 152, 472 S.E.2d 374, 375 (1996). Although an interlocutory order is ordinarily not immediately appealable, an interlocutory order may be immediately appealed if it affects a substantial right. *See* N.C.G.S. § 1-277(a) (2019); N.C.G.S. § 7A-27(b)(3)(a) (2019).

¶ 12 Here, the Order disposed of only the claims against Gaston County and Hopper, and the remaining claims include: breach of contract and breach of implied warranty of habitability against Bane Homes and James Bane in his individual capacity; rescission against Bane Homes; negligence against James Bane in his individual capacity; negligence and misrepresentation against LaChelle Crosby; and unfair and deceptive trade practices against LaChelle Crosby and Home Buyers Marketing, II, Inc. As the Clines' various claims against the other Defendants have not been resolved and further action by the trial court is required "in order to settle and determine the entire controversy[,]" the Clines' appeal from the Order is an appeal from "[a]n interlocutory order . . . , which does not dispose of the case[.]" *Veazey*, 231 N.C. at 362, 57 S.E.2d at 381. The Order must affect a substantial right in order for us to have proper appellate jurisdiction.

¶ 13 The Clines argue the Order affects a substantial right and is immediately appealable because

> [a] litigant appealing the denial of a sovereign[4] immunity defense need only show that they raised the issue below and that the trial court rejected it in order to establish that the challenged order affects [a] substantial right. [The trial court judge] ruled against [the Clines] exclusively on the issue of "governmental immunity and public official['s] immunity." Thus, this immediate appeal of governmental immunity is approved by statute and this Court. Applying the Court's logic in [*Greene v. Barrick*, 198 N.C. App. 647, 680 S.E.2d 727 (2009)] . . . , [the Clines] need not further explain why, when on the face of [the trial judge's] ruling a substantial right is affected. So long as the issue involves sovereign immunity, an immediate appeal is properly before this Court.

In *Greene*, we decided an interlocutory order granting summary judgment based on the defense of sovereign immunity was properly before us:

> This Court has held that "when the moving party claims sovereign, absolute or qualified immunity, the denial of a motion for summary judgment is immediately appealable." *Moore v. Evans*, 124 N.C. App. 35, 39, 476 S.E.2d 415, 420 (1996) (citations omitted). Even though this case involves the grant, rather than the denial of sovereign immunity, we believe the same type of issues are called into question by the appeal, and therefore, [the] plaintiff's appeal is properly before this Court.

Greene, 198 N.C. App. at 650, 680 S.E.2d at 729-30. According to *Greene*, both an order *denying* a motion for summary judgment on the basis of sovereign immunity and an order *granting* a motion for summary judgment on the basis of sovereign immunity affect a substantial right. *Id.*

¶ 14 Appellees argue our "holding [in *Greene*] is inconsistent with the public policy bases for permitting interlocutory appeals." However,

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4. Gaston County is a county agency. "As such, the immunity it possesses is more precisely identified as governmental immunity, while sovereign immunity applies to the State and its agencies." *Craig ex rel. Craig v. New Hanover Cty. Bd. of Educ.*, 363 N.C. 334, 335 n.3, 678 S.E.2d 351, 353 n.3 (2009). For the purposes of our analysis, the distinction is immaterial.

> as is often the case with our jurisprudence, what one might reasonably assume is not what our case law holds. In a series of cases that we are unable to distinguish from this one, our Court has held that the *grant* of a motion to dismiss based on sovereign or governmental immunity is immediately appealable. Because one panel of this Court cannot overrule another, we are bound to hold that [the Clines'] interlocutory appeal on this issue is permissible.

Ballard v. Shelley, 257 N.C. App. 561, 564, 811 S.E.2d 603, 605-06 (2018) (citations omitted) (emphasis in original). As an appeal granting governmental immunity affects a substantial right, the Clines' appeal is properly before this Court. We now address the merits of the appeal.

B. Claims Against Gaston County and Hopper in his Official Capacity

¶ 15 **[2]** The Clines argue the trial court erred by granting summary judgment to Gaston County and Hopper, in his official capacity, on the grounds Gaston County waived its governmental immunity for itself and its employees when it purchased liability insurance.

¶ 16 "Under the doctrine of governmental immunity, a county or municipal corporation is immune from suit for the negligence of its employees in the exercise of governmental functions absent waiver of immunity." *Estate of Williams ex rel. Overton v. Pasquotank Cty. Parks & Recreation Dep't*, 366 N.C. 195, 198, 732 S.E.2d 137, 140 (2012) (marks omitted). "In North Carolina, governmental immunity serves to protect a municipality, as well as its officers or employees who are sued in their official capacity, from suits arising from torts committed while the officers or employees are performing a governmental function." *Schlossberg*, 141 N.C. App. at 439, 540 S.E.2d at 52. Governmental immunity is "absolute unless the [county] has consented to [suit] or otherwise waived its right to immunity." *Id.* at 440, 540 S.E.2d at 52.

1. Governmental Function

¶ 17 Exercising a governmental function is a requirement for governmental immunity to attach. *See Estate of Williams*, 366 N.C. at 198, 732 S.E.2d at 140. However, the Clines do not argue, at the trial court level or on appeal, that Gaston County or Hopper, in his official capacity, were not performing a governmental function when they were allegedly negligent. As such, whether Gaston County or Hopper, in his official capacity, were performing a governmental function is deemed abandoned and not an issue before us on appeal. *See* N.C. R. App. P. 28(a) (2021)

("The scope of review on appeal is limited to issues so presented in the several briefs. Issues not presented and discussed in a party's brief are deemed abandoned.").

2. Purchase of Insurance Coverage

¶ 18 "A plaintiff bringing claims against a governmental entity and its employees acting in their official capacities must allege and *prove* that the officials have waived their [governmental] immunity or otherwise consented to suit[.]" *Sellers v. Rodriguez*, 149 N.C. App. 619, 623, 561 S.E.2d 336, 339 (2002) (emphasis added). Under the plain language of N.C.G.S. § 153A-435, counties waive governmental immunity by purchasing an insurance policy that would indemnify the county and its employees:

> A county may contract to insure itself and any of its officers, agents, or employees against liability for wrongful death or negligent or intentional damage to person or property or against absolute liability for damage to person or property caused by an act or omission of the county or of any of its officers, agents, or employees when acting within the scope of their authority and the course of their employment. The board of commissioners shall determine what liabilities and what officers, agents, and employees shall be covered by any insurance purchased pursuant to this subsection.
>
> Purchase of insurance pursuant to this subsection waives the county's governmental immunity, *to the extent of insurance coverage*, for any act or omission occurring in the exercise of a governmental function. Participation in a local government risk pool pursuant to Article 23 of [N.C.G.S.] Chapter 58 shall be deemed to be the purchase of insurance for the purposes of this section. By entering into an insurance contract with the county, an insurer waives any defense based upon the governmental immunity of the county.

N.C.G.S. § 153A-435(a) (2019) (emphasis added). While "[a] county may waive [governmental] immunity by purchasing liability insurance [under N.C.G.S. § 153A-435], [it is waived] only to the extent of coverage provided." *Cunningham v. Riley*, 169 N.C. App. 600, 602, 611 S.E.2d 423, 424, *disc. rev. denied and appeal dismissed*, 359 N.C. 850, 619 S.E.2d 405 (2005), *cert. denied*, 546 U.S. 1142, 163 L. Ed. 2d 1008 (2006).

¶ 19 Appellees argue the purchase of liability insurance does not constitute waiver of governmental immunity because the County Manager of Gaston County, Kim Eagle ("Eagle"), asserts in an affidavit that "the insurance purchased by Gaston County does not extend to those governmental functions for which governmental immunity would apply and does not operate as a waiver of the defense of governmental immunity." We have previously interpreted similar provisions in liability insurance contracts. *See Patrick v. Wake Cty. Dep't of Human Servs.*, 188 N.C. App. 592, 655 S.E.2d 920 (2008); *Wright v. Gaston Cty.*, 205 N.C. App. 600, 698 S.E.2d 83 (2010).

¶ 20 In *Patrick*, the plaintiff filed a complaint against the defendants in their official capacities as supervisors of the Child Protective Services of the Wake County Department of Human Services. *Patrick*, 188 N.C. App. at 593, 655 S.E.2d at 922. The insurance policy at issue there contained the following exclusion: "this policy provides coverage only for occurrences or wrongful acts for which the defense of governmental immunity is clearly not applicable or for which, after the defense[] is asserted, a court of competent jurisdiction determines the defense of governmental immunity not to be applicable." *Id.* at 596, 655 S.E.2d at 923 (alteration omitted). In holding the exclusionary provision was clear and unambiguous and the defendants had not waived governmental immunity through the purchase of the policy, we stated:

> If the language in an exclusionary clause contained in a policy is ambiguous, the clause is to be strictly construed in favor of coverage. If the meaning of the policy is clear and only one reasonable interpretation exists, the courts must enforce the contract as written; they may not, under the guise of construing an ambiguous term, rewrite the contract or impose liabilities on the parties not bargained for and found therein.

Id. at 596-97, 655 S.E.2d at 924 (citations and marks omitted).

¶ 21 In *Wright*, the provision at issue stated:

> By accepting coverage under this policy, neither the *insured* nor States waive any of the *insured's* statutory or common law immunities and limits of liability and/or monetary damages . . . , and States shall not be liable for any *claim* or *damages* in excess of such immunities and/or limits.

Wright, 205 N.C. App. at 607, 698 S.E.2d at 89 (emphasis in original). We relied on our holding and reasoning in *Patrick* to conclude Gaston

County did not waive governmental immunity. *Id.* at 607-08, 698 S.E.2d at 89-90.

¶ 22 Here, the Record reflects a liability insurance policy for Gaston County was in effect from 1 July 2015 to 1 July 2016. However, the insurance contract in its entirety is not contained in the Record and does not appear to have been presented to the trial court. A total of three pages from the actual policy are included in the Record, entitled: the *Schedule of Forms and Endorsements*, the *Public Risk Liability Retained Limit Policy Declarations*, and the *"Wrongful Act" Claims-Made Coverage*. These three pages do not contain the language of the coverage provisions or exclusion provisions and their exact language does not appear anywhere else in the Record. In her affidavit, Eagle provided a parol summary of her interpretation of the policy:

> On the occurrence dates alleged in the Complaint and its amendments, Gaston County was self-insured up to $250,000[.00] and had certain excess liability insurance . . . that comes into effect for certain incidents after $250,000[.00] has been expended by the County on each such incident. However, the insurance purchased by Gaston County does not extend to those governmental functions for which governmental immunity would apply and does not operate as a waiver of the defense of governmental immunity.

While Appellees' motion for summary judgment indicates reliance on discovery responses, nothing in the Record indicates presentation of the insurance contract to the trial court for examination of its contents.

¶ 23 The lack of the insurance contract and exclusionary language in the Record restricts us from determining the existence of coverage for the alleged acts of Gaston County or Hopper in his official capacity.

> Once the moving party has made and supported its motion for summary judgment, section (e) of Rule 56 provides that the burden is then shifted to the non-moving party to introduce evidence in opposition to the motion, setting forth specific facts showing that there is a genuine issue for trial. At [that] time, the non-movant must come forward with a forecast of his own evidence.

Crowder Constr. Co. v. Kiser, 134 N.C. App. 190, 196, 517 S.E.2d 178, 183 (marks omitted), *disc. rev. denied*, 351 N.C. 101, 541 S.E.2d 142 (1999).

The Clines, as the non-moving party, had the burden to produce the insurance contract to allow an examination of Gaston County's potential waiver of governmental immunity.

¶ 24 The Clines failed to forecast evidence showing the existence of a genuine issue of material fact as to whether Appellees waived governmental immunity to the extent of Gaston County's insurance coverage. The entry of summary judgment in favor of Gaston County and Hopper, in his official capacity, was proper. However, the claims against Hopper, in his individual capacity, are controlled by separate caselaw, which is addressed below.

C. Claims Against Hopper in His Individual Capacity

¶ 25 **[3]** The Clines argue Hopper's position as an Environmental Health Administrator is a public employee, rather than a public official, and therefore he is not entitled to public official's immunity. We agree.

¶ 26 The defense of public official's immunity is a "derivative form" of governmental immunity. *Epps v. Duke Univ., Inc.*, 122 N.C. App. 198, 203, 468 S.E.2d 846, 850, *disc. rev. denied*, 344 N.C. 436, 476 S.E.2d 115 (1996). Public official's immunity precludes suits against public officials in their individual capacities and protects them from liability "[a]s long as a public officer lawfully exercises the judgment and discretion with which he is invested by virtue of his office, keeps within the scope of his official authority, and acts without malice or corruption[.]" *Smith v. State*, 289 N.C. 303, 331, 222 S.E.2d 412, 430 (1976).

¶ 27 "It is settled law in this jurisdiction that a public official, engaged in the performance of governmental duties involving the exercise of judgment and discretion, may not be held personally liable for mere negligence in respect thereto." *Meyer*, 347 N.C. at 112, 489 S.E.2d at 888. "An employee, on the other hand, is personally liable for negligence in the performance of his or her duties proximately causing an injury." *Reid v. Roberts*, 112 N.C. App. 222, 224, 435 S.E.2d 116, 119, *disc. rev. denied*, 335 N.C. 559, 439 S.E.2d 151 (1993). "Public officials receive immunity because it would be difficult to find those who would accept public office or engage in the administration of public affairs if they were to be personally liable for acts or omissions involved in exercising their discretion." *Isenhour v. Hutto*, 350 N.C. 601, 610, 517 S.E.2d 121, 127 (1999) (marks omitted).

> Our courts have recognized several basic distinctions between a public official and a public employee, including: (1) a public office is a position created by the constitution or statutes; (2) a public official

> exercises a portion of the sovereign power; and (3) a public official exercises discretion, while public employees perform ministerial duties.

Id. We are guided by the factors set forth in *Isenhour* and our prior holdings to determine whether Hopper, as an Environmental Health Administrator for a local county department of health, is a public official entitled to immunity or a public employee.

¶ 28 We begin our analysis by addressing the first factor, whether the position of Environmental Health Administrator is "created by the constitution or statutes[.]" *Id.* "A position is considered 'created by statute' when 'the officer's position has a clear statutory basis or the officer has been delegated a statutory duty by a person or organization created by statute' or the Constitution." *Baker v. Smith*, 224 N.C. App. 423, 428, 737 S.E.2d 144, 148 (2012) (alteration omitted) (quoting *Fraley v. Griffin*, 217 N.C. App. 624, 627, 720 S.E.2d 694, 696 (2011), *cert. denied*, 367 N.C. 234, 748 S.E.2d 552 (2013)).

¶ 29 We have previously decided the positions of "Environmental Health Specialists" and "Environmental Health Supervisors" for a county health department are not created by statute. *See Murray v. Cty. of Person*, 191 N.C. App. 575, 580, 664 S.E.2d 58, 61-62 (2008), *disc. rev. denied*, 363 N.C. 129, 673 S.E.2d 360 (2009); *Block v. Cty. of Person*, 141 N.C. App. 273, 281-82, 540 S.E.2d 415, 421-22 (2000). However, whether an "Environmental Health Administrator" is a position created by statute is a question of first impression.

¶ 30 Hopper points to N.C.G.S. § 130A-41(b)(12) and N.C.G.S. § 130A-227(a) in arguing his position is created by statute. *See* N.C.G.S. §§ 130A-41(b)(12), 130A-227(a) (2019). N.C.G.S. § 130A-41(b)(12) authorizes the powers and duties of local health directors, including the power and duty "[t]o employ and dismiss employees of the local health department in accordance with [N.C.G.S. Chapter 126]" and N.C.G.S. § 130A-227(a) authorizes the Department of Health and Human Services to "employ environmental engineers, sanitarians, soil scientists and other scientific personnel necessary to carry out the sanitation provisions of this Chapter and the rules of the Commission." N.C.G.S. §§ 130A-41(b)(12), 130A-227(a) (2019). These statutes authorize and regulate the hiring of certain employees, but do not operate, either on their own or in conjunction, to create the position of Environmental Health Administrator. There is no "clear statutory basis" for the position of Environmental Health Administrator. *Baker*, 224 N.C. App. at 428, 737 S.E.2d at 148.

¶ 31 However, "[o]ur case law makes clear that where a statute expressly creates the authority to delegate a duty, a person or organization who is delegated and performs the duty on behalf of the person or organization in whom the statute vests the authority to delegate passes the first [] *Isenhour* factor." *McCullers v. Lewis*, 265 N.C. App. 216, 223, 828 S.E.2d 524, 532 (2019); *see, e.g.*, *Baker*, 224 N.C. App. at 428-30, 737 S.E.2d at 148-49 (emphasis in original) (holding where the relevant statutes (1) gave the constitutionally-created Sheriff the duty to take "care and custody of the jail" and (2) provided the sheriff with authority to "appoint a deputy *or employ others to assist him in performing his official duties*[,]" assistant jailers "are delegated [a] statutory duty . . . by the [S]heriff – a position created by our Constitution" satisfying the first *Isenhour* factor); *Hobbs v. N.C. Dep't of Human Res.*, 135 N.C. App. 412, 421-22, 520 S.E.2d 595, 602 (1999) (holding because the relevant statute gave the director of social services the authority to "delegate to one or more members of his staff the authority to act as his representative[,]" social workers were acting as public officials for public official immunity purposes); *Cherry v. Harris*, 110 N.C. App. 478, 480-81, 429 S.E.2d 771, 772-73 (holding a forensic pathologist who conducted an autopsy and prepared reports in response to an official request by a county medical examiner satisfied the first factor of the *Isenhour* test because the medical examiner, a position created by statute, "had the statutory authority pursuant to [N.C.G.S.] § 130A-389(a) [] to order [] an autopsy be performed by a pathologist . . . designated by the Chief Medical Examiner), *disc. rev. denied*, 335 N.C. 171, 436 S.E.2d 371 (1993). In *Baker*, *Hobbs*, and *Cherry*, we pointed directly to a statute that authorized a constitutionally or statutorily created position or organization to delegate its statutory authority to another individual.

¶ 32 The Clines argue N.C.G.S. § 130A-41(b)(12) lacks language to indicate there is a statutory delegation of authority to sufficiently pass the first *Isenhour* factor. Before the trial court, Hopper argued there is "delegation of the authority to enforce the commission for health services sanitation rules as required by the administrative code," and this "delegation of authority to do the very acts of which [the Clines] complained" is sufficient to pass the first *Isenhour* factor. The only support for Hopper's argument before the trial court was a letter dated 8 May 1995 from the North Carolina Department of Environment, Health and Natural Resources ("DEHNR") stating:

> Attached is the authorization/identification card for Mr. Norman Curtis Hopper, Environmental Health Specialist, employed by [Gaston County Health Department].

> Please give the card to Mr. Hopper with instructions that it must be available at all times for identification during official business.
>
> The authorization for On-Site Wastewater delegates authority to administer and enforce the laws in [N.C.G.S.] Chapter 130A, Article 11 and the rules promulgated thereunder in the North Carolina Administrative Code Title 15A- Subchapter 18A.1900 et seq.
>
> Rules governing the "Delegation of Authority to Enforce Commission for Health Services' Sanitation Rules" require, in 15A NCAC 18A.2302(1), that individuals who are delegated authority be employed by a local health department. In the event that Mr. Hopper is no longer employed by [Gaston County Health Department], delegation of authority to enforce state laws and rules in the Gaston County is immediately suspended. At that time, the authorization/identification card must be forwarded to this office.

However, in May 1995, Hopper was employed in the position of Environmental Health Specialist,[5] a role we have previously held to be a public employee. *See Block*, 141 N.C. App. at 282, 540 S.E.2d at 421-22 (citations and marks omitted) ("Our courts have held that a supervisor of the Department of Social Services is a public employee. Similarly, a supervisor for the Health Department is a public employee, as is a specialist, who is a subordinate of the supervisor. As such, these employees may be held personally liable for the negligent performance of their duties that proximately caused foreseeable injury."). The forecasted evidence, to wit Hopper's letter from DEHNR regarding his position as Environmental Health Specialist, does not create a genuine issue of material fact as to Hopper's ability to invoke public official's immunity. As Hopper made no other delegation argument before the trial court, we hold there is no statutory authorization for the delegation of a duty in his position as Environmental Health Administrator.

¶ 33 Since the statutes cited by Hopper neither provide a clear statutory basis for the position of Environmental Health Administrator nor allow

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5. Hopper was employed as an "[E]nvironmental [H]ealth [S]pecialist [I]ntern" in 1990 with Gaston County. In 1992, his role changed to "[E]nvironmental [H]ealth [S]pecialist." Around 1999 or 2000, Hopper became a "supervisor/coordinator," and then in 2002 became "the [D]epartment [A]dministrator for [E]nvironmental [H]ealth," his current role.

a person or organization created by statute to delegate any statutory duties to Environmental Health Administrators, Hopper has failed to establish his position was created by statute. As the first factor is not met, we need not reach the other two *Isenhour* factors. *See Leonard v. Bell*, 254 N.C. App. 694, 705, 803 S.E.2d 445, 453 (2017) ("Because we hold that [the] defendants' positions are not created by statute, we need not address the remaining elements to reach the conclusion that [the] defendants are not public officials entitled to immunity."). The trial court erred in granting summary judgment to Hopper, in his individual capacity, on the basis of public official's immunity and we reverse.

CONCLUSION

¶ 34 The Clines did not meet their burden of production to show Gaston County and Hopper, in his official capacity, waived governmental immunity through the purchase of liability insurance. The trial court properly granted Appellees' motion for summary judgment in regards to Gaston County and Hopper, in his official capacity.

¶ 35 Hopper is a public employee and not a public official. His position as Environmental Health Administrator was not created by statute and the only argument he advanced at the trial court as to delegation fails based on our decision in *Block*. As such, he is not protected by public official's immunity and the trial court erred in granting summary judgment to Hopper, in his individual capacity, on the basis of public official's immunity.

AFFIRMED IN PART; REVERSED IN PART.

Judges DILLON and ARROWOOD concur.

IN RE K.N.H.

[278 N.C. App. 27, 2021-NCCOA-267]

IN THE MATTER OF K.N.H.

No. COA20-299

Filed 15 June 2021

1. Juveniles—delinquency—probation—conditions—oral

The trial court's order that a delinquent juvenile submit to electronic monitoring for ninety days and comply with all conditions set by his court counselor comported with statutory requirements for juvenile probation, and the court counselor's condition that the juvenile remain in the presence of one of his parents while out of the house on electronic monitoring leave was not required to be in writing. Therefore, the trial court did not err by entering a Level 3 disposition based solely on its finding that the juvenile had violated a condition of his probation for which he received only oral notice from his court counselor.

2. Juveniles—commitment—precise terms—oral pronouncement—prejudice analysis

Although the trial court erred in a juvenile proceeding by failing to state with particularity the precise duration of the juvenile's commitment to a youth development center in open court, the juvenile failed to show that he was prejudiced by the error where the written order clearly indicated the duration and where the juvenile was present when the court selected his disposition and had the opportunity to ask questions.

Appeal by juvenile from orders entered 23 May 2019 by Judge William F. Helms, III in Union County District Court. Heard in the Court of Appeals 11 May 2021.

Attorney General Joshua H. Stein, by Assistant Attorney General Erika N. Jones, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Hannah H. Love, for Defendant-Appellant.

CARPENTER, Judge.

¶ 1 Appellant K.N.H. appeals from an order on motion for review (the "Order on Motion for Review") dated 23 May 2020, concluding K.N.H. violated the conditions of probation and ordering an entry of a Level 3

disposition, and from a disposition and commitment order (the "Disposition and Commitment Order") entered 23 May 2020 committing him to a youth development center ("YDC"). On appeal, he argues the trial court erred in imposing a Level 3 disposition based solely on its finding that he had violated an oral condition of probation. Further, he asserts that the trial court erred in entering the Level 3 disposition by failing to orally state the duration of the disposition at the time of commitment to the YDC, as statutorily required. For the following reasons, we affirm.

I. Factual & Procedural Background

¶ 2 In pertinent part, the record reveals the following: on 14 December 2017, an adjudication hearing was held in connection with four juvenile petitions the State filed against K.N.H., including common law robbery. K.N.H. admitted to the lesser offense of larceny from a person for the common law robbery allegation. The State dismissed the remaining three charges against him. The trial court entered a Level 1 disposition and placed K.N.H. on probation for a period of twelve months.

¶ 3 On 3 May 2018, the State filed a juvenile petition against K.N.H. alleging one count of possession of stolen goods. On 28 June 2018, K.N.H. admitted to the offense of possession of stolen goods. The trial court ordered K.N.H. to Level 2 probation for twelve months.

¶ 4 On 23 August 2018, the State filed three additional petitions against K.N.H. alleging attempted robbery with a dangerous weapon, minor in possession of a handgun, and assault by pointing a gun. On 27 September 2018, the court conducted an adjudication hearing. At the hearing, the offense of robbery with a dangerous weapon was amended to the offense of attempted common law robbery pursuant to K.N.H.'s *Alford* plea.[1] K.N.H. admitted to the offense of possessing a handgun, and the State dismissed the remaining charge. The case was continued for disposition until 11 October 2018.

¶ 5 On 11 October 2018, the trial court entered its dispositional order and placed K.N.H. on Level 2 probation for a period of twelve months under the previous terms and conditions as well as the additional conditions imposed by the 11 October 2018 supplemental order for conditions

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1. In *North Carolina v. Alford*, 400 U.S. 25, 37–38, 27 L. Ed. 2d 162, 171–72, 91 S. Ct. 160, 167–68 (1970), the Supreme Court of the United States held a defendant may enter a "plea containing a protestation of innocence" when the defendant intelligently concludes that a guilty plea is in his best interest, and the record "contains strong evidence of actual guilt."

of probation (the "Supplemental Order"), which the court incorporated by reference and attached to the dispositional order. The Supplemental Order required K.N.H. to, *inter alia*, "submit to [e]lectronic [m]onitoring for 90 days and comply with all conditions set by the [c]ourt [c]ounselor."

¶ 6 On 9 January 2019, a juvenile court counselor filed a motion for review alleging K.N.H. had "violated the conditions imposed by the [c]ourt by receiving new delinquent charges that include[d] using a handgun." Further, it was based on K.N.H.'s violations of the conditions imposed by the 11 October 2018 dispositional order, including remaining on good behavior and not violating any laws; not possessing a firearm, explosive device, or other deadly weapon; and submitting to electronic monitoring for ninety days and complying with all conditions set by the court counselor.

¶ 7 On 17 January 2019, the trial court held a probation review hearing, and K.N.H. was ordered to "remain in secure custody" due to his status as a "danger to persons." K.N.H. remained in secure custody until the adjudication and secure hearing on 23 May 2019.

¶ 8 On 23 May 2019, the trial court held a hearing in connection with the motion for review before the Honorable W. Robert Bell Pomeroy in Union County District Court. The prosecutor for the State informed the court that it was proceeding only on the allegation that K.N.H. willfully violated the condition of submitting to electronic monitoring. K.N.H. denied the allegation.

¶ 9 At the hearing, Stephanie Missick ("Ms. Missick"), the juvenile court counselor over K.N.H.'s case, testified K.N.H. and his parent signed a form for the monitoring equipment in case it was damaged and, at that time, they "talked about the [probation] conditions." She mentioned, "[K.N.H.] wasn't to leave unless he was with his parent." If K.N.H. was given "time out," meaning time to be outside of his home on electronic monitoring, Ms. Missick "would have to go in the computer and put time out, he had to be with his parent." According to Ms. Missick, she gave K.N.H. time out near the holidays, including multiple days in December 2018 and on 1 January 2019. She also testified that when K.N.H. was placed on the electronic monitoring, she told him, "If you go anywhere, you've got to be with [a parent]." Finally, Ms. Missick testified that K.N.H. told her that he "did leave" and that "[h]e wasn't with his dad" for the entire "time out" period on 1 January 2019.

¶ 10 K.N.H.'s probation violation in this case occurred on 1 January 2019. Ms. Missick scheduled K.N.H. time out from 11:00 a.m. to 7:00 p.m. in light of the New Year's Day holiday. K.N.H.'s mother testified that she

had K.N.H.'s maternal grandmother take K.N.H. to the Icemorlee area of Monroe to visit his father and family because she did not have a vehicle herself. She further testified that his grandmother saw K.N.H.'s father at a gas station, and she dropped K.N.H. off with him. K.N.H.'s father took him to his aunt's house where they would have dinner with family. When the prosecutor asked K.N.H.'s mother if she "understood that when [K.N.H.] was home with [her] he was supposed to be with [her]", she responded, "[a]nd he was. Yes, ma'am."

¶ 11 According to K.N.H.'s father, once he picked up K.N.H. from the gas station at about 1:00 p.m., they went to K.N.H.'s aunt's house for a dinner with 15 or 16 family members. K.N.H.'s father testified he last saw K.N.H. "standing on the porch" of the house at around 2:00 p.m. He further testified he did not know where K.N.H. was from approximately 2:00 p.m. to 5:00 p.m. When asked if he "knew that [he] had to have eyes on [K.N.H.] and know where he was at all times," K.N.H's father responded, "I didn't have conversations, but I was there. I heard things." K.N.H.'s father acknowledged that both he and K.N.H. were present when Ms. Missick told them that K.N.H. had to be with a parent at all times when he was on time out.

¶ 12 After hearing closing arguments, the court found K.N.H. "was in willful violation of [his] probationary conditions." Consequently, the court committed K.N.H. to a YDC for an indefinite period.

¶ 13 On 23 May 2019, the Honorable Judge Williams F. Helms III entered the Order on Motion for Review, which found the allegations were proven by the greater weight of the evidence. Additionally, Judge Helms entered the written Disposition and Commitment Order, imposing a Level 3 disposition and committing K.N.H. to a YDC for a minimum period of six months and a maximum period until his eighteenth birthday. K.N.H. filed a timely, written notice of appeal from the 23 May 2019 Order on Motion for Review and Disposition and Commitment Order.

II. Jurisdiction

¶ 14 This Court has jurisdiction to address the juvenile's appeal from the final orders pursuant to N.C. Gen. Stat. § 7B-2602 (2019) and N.C. Gen. Stat. § 7B-2604 (2019).

III. Issues

¶ 15 The issues on appeal are whether (1) the trial court erred by entering a Level 3 disposition based solely on its finding that K.N.H. violated a condition of probation for which he did not receive written notice; and (2) the trial court erred by entering a Level 3 disposition without stating

the precise duration of K.N.H.'s commitment to the YDC in its oral order of disposition.

IV. Standard of Review

¶ 16 "When a juvenile argues to this Court that the trial court failed to follow a statutory mandate, the error is preserved and is a question of law reviewed *de novo*. Under a *de novo* review, the [C]ourt considers the matter anew and freely substitutes its own judgment for that of the lower tribunal." *In re E.M.*, 263 N.C. App. 476, 479, 823 S.E.2d 674, 676 (2019) (citations omitted) (emphasis added).

V. Violation of Electronic Monitoring Probation Condition

¶ 17 **[1]** In his first argument, K.N.H. contends the trial court erred in failing to follow N.C. Gen. Stat. § 7B-2512(a), which mandates the court to "state with particularity" the terms and conditions of probation in both the oral and written orders of disposition since probation is a "precise term[ ] of the disposition . . . ." N.C. Gen. Stat. § 7B-2512(a) (2019). Furthermore, he asserts that since the trial court failed to make such written findings, the condition of probation requiring him to be in the presence of one of his parents while on electronic monitoring is invalid and could not be willfully violated; thus, the trial court abused its discretion by entering a Level 3 disposition based on K.N.H.'s violation of that condition of probation. The State argues that this issue was not properly preserved for appellate review. The State contends, even if it were properly preserved, the probation condition imposed by the trial court was valid and enforceable, and the violation of the condition permitted the court to enter a Level 3 disposition.

¶ 18 After careful review, we find K.N.H.'s argument that the trial court failed to follow a statutory mandate is preserved, *see In re E.M.*, 263 N.C. App. at 479, 823 S.E.2d at 676, and agree with the State that the trial court's order of electronic monitoring was consistent with the pertinent statutory requirements.

¶ 19 "The purpose of dispositions in juvenile actions is to design an appropriate plan to meet the needs of the juvenile and to achieve the objectives of the State in exercising jurisdiction, including the protection of the public." N.C. Gen. Stat. § 7B-2500 (2019). The disposition developed by the trial court for each case is designed to "[p]romote public safety"; "[e]mphasize[ ] accountability and responsibility" of the juvenile's parents and guardians as well as the juvenile; and "[p]rovide[ ] appropriate consequences, treatment, training and rehabilitation" for the juvenile. N.C. Gen. Stat. § 7B-2500 (1)–(3).

¶ 20 N.C. Gen. Stat. § 7B-2512 provides the requirements for the dispositional order:

> [t]he dispositional order shall be in writing and shall contain appropriate findings of fact and conclusions of law. The court shall state with particularity, both orally and in the written order of disposition, the precise terms of the disposition including the kind, duration, and the person who is responsible for carrying out the disposition and the person or agency in whom custody is vested.

N.C. Gen. Stat. § 7B-2512(a).

¶ 21 A "court exercising jurisdiction over a juvenile who has been adjudicated delinquent" may impose certain dispositional alternatives in accordance with N.C. Gen. Stat. § 7B-2508, including "plac[ing] the juvenile on probation under the supervision of a juvenile court counselor, as specified in [N.C. Gen. Stat. § 7B-2510]." N.C. Gen. Stat. § 7B-2506(8) (2019).

¶ 22 N.C. Gen. Stat. § 7B-2510 provides the conditions of probation for the underlying dispositional alternatives upon which a delinquent juvenile may be placed pursuant to N.C. Gen. Stat. § 7B-2506(8). Under subsection (a), the conditions of probation ordered by a court must be "related to the needs of the juvenile and [be] reasonably necessary to ensure that the juvenile will lead a law-abiding life." N.C. Gen. Stat. § 7B-2510(a). Under subsection (b), the court may impose the "regular conditions of probation specified in subsection (a)," or it may choose from certain other conditions. N.C. Gen. Stat. § 7B-2510(b). One such condition of probation a court may order in a juvenile proceeding under subsection (b) is the juvenile "[c]ooperate with electronic monitoring" so long as the juvenile is "directed to comply by the chief court counselor" and "the juvenile is subject to Level 2 dispositions pursuant to [N.C. Gen. Stat. § 7B-2508] . . . ." N.C. Gen. Stat. § 7B-2510(b)(4).

¶ 23 "When the language of a statute is clear and unambiguous, there is no room for judicial construction and the courts must give the statute its plain and definite meaning, and are without power to interpolate, or superimpose, provisions and limitations not contained therein." *In re Banks*, 295 N.C. 236, 239, 244 S.E.2d 386, 388–89 (1978) (citation omitted).

¶ 24 In this case, the trial court ordered K.N.H. to submit to electronic monitoring for ninety days pursuant to N.C. Gen. Stat. § 7B-2510(b) and to comply with all conditions set by the court counselor in the court's Supplemental Order. The Supplemental Order also specifically stated

that if K.N.H. were to "violate[ ] curfew or any conditions set forth by the court counselor[, then] he shall be placed back in detention."

¶ 25 N.C. Gen. Stat. § 7B-2506(8) "clear[ly] and unambiguous[ly]" allows "place[ment of] the juvenile on probation under the supervision of a juvenile court counselor." *See Id.* at 239, 244 S.E.2d at 389–90; N.C. Gen. Stat. § 7B-2506(8). Furthermore, N.C. Gen. Stat. § 7B-2510(b) allows a court to impose the "[c]ooperat[ion] with electronic monitoring" as a condition of probation in certain circumstances. Here, the statutory requirements were fulfilled for the court to impose electronic monitoring because K.N.H. was subject to a Level 2 disposition, and the chief court counselor directed him to comply with the condition of probation. Based on the plain language of the statute, only the specific condition of probation upon which the juvenile is placed—in this case, electronic monitoring—was required to be precisely identified in the dispositional order. The Juvenile Code does not require that the disposition include the precise terms and conditions or rules of electronic monitoring that the court counselor imposes on the juvenile. Had the General Assembly intended district courts to include such detailed conditions, it would have included such language in the statute. *See e.g.*, N.C. Gen. Stat. § 7B-2506(6) (stating a dispositional alternative may include an order for "the juvenile to perform up to 100 hours supervised community service consistent with the juvenile's age, skill, and ability, specifying the nature of the work and the number of hours required").

¶ 26 In arguing that specific juvenile conditions of probation must be in writing to be valid, K.N.H. cities to the parallel adult criminal provision on probation conditions, which specifically requires that "[a] defendant released on supervised probation . . . be given a written statement explicitly setting forth the conditions on which he is being released" as well as a "written statement setting forth [any] modifications." *See* N.C. Gen. Stat. § 15A-1343(c). This argument is without merit. Since the General Assembly did not expressly provide the same requirements for juvenile probation in the Juvenile Code as the Criminal Procedure Act provides for adult criminals, we give the Juvenile Code statute its "plain and definite meaning" without interpolating language from the criminal statutes. *See In re Banks*, 295 N.C. at 239, 244 S.E.2d at 388.

¶ 27 Additionally, "[t]he General Assembly has demonstrated through the Juvenile Code its desire to give the courts a broad range of alternatives in juvenile delinquency cases, with the manifest goal of creating optimal solutions tailored to the particular circumstances of each wayward child." *In re D.L.H.*, 364 N.C. 214, 219, 694 S.E.2d 753, 756 (2010) (holding the adult criminal statute governing credit for time served before

disposition is inapplicable to juvenile proceedings based on the plain language of the Criminal Procedure Act and the Juvenile Code combined with the "legislative policy of affording the courts a wide variety of options in juvenile matters").

¶ 28 Like our Supreme Court in *In re D.L.H.*, we refuse to limit the options of the district courts by subjecting delinquent juveniles to adult criminal statutes where there is no statutory indication that a given criminal statute applies to a juvenile proceeding. Requiring the courts to set forth the specific rules, terms, and conditions of each dispositional alternative or condition of probation when not statutorily mandated would conflict with the goals of the Juvenile Code to provide "a broad range of alternatives" in juvenile proceedings and would interfere with the district court's power to delegate certain tasks and responsibilities to third parties involved in the dispositional plans of delinquent juveniles. *See id.* at 219, 694 S.E.2d at 756. Moreover, in its role as an appellate court, the Court of Appeals is limited to interpreting statutes—not creating or enacting statutes as these are functions reserved for the legislatures. *Share v. N.C. State Univ. Veterinary Teaching Hosp.*, 219 N.C. App. 117, 127, 723 S.E.2d 352, 358 (2012) ("This Court is an error-correcting court, not a law-making court.").

¶ 29 Relying on the unpublished case of *In re E.M.*, K.N.H. next maintains that oral notice of a probation condition was insufficient because "[a] juvenile must receive written notice of a condition of probation for the condition to be valid." We disagree.

¶ 30 In the case of *In re E.M.*, the trial court judge orally announced that the juvenile was to cooperate with electronic monitoring if directed to do so by the chief court counselor. 227 N.C. App. 649, 745 S.E.2d 374, No. COA13-13, 2013 N.C. App. LEXIS 600, at *11-12 (N.C. App. June 4, 2013) (unpublished). Although the oral announcement of the disposition by the trial court judge was properly given, the written disposition did not provide that the juvenile was subject to electronic monitoring at the discretion of the court counselor. *Id.* at *11. Our Court held that "[b]ecause the written disposition order d[id] not require [electronic monitoring as a] condition of probation," the oral order was invalid and inapplicable to the juvenile since it violated the statutory mandate imposed by N.C. Gen. Stat. § 7B-2510(b)(4). *Id.* at *11.

¶ 31 In the instant case, unlike *In re E.M.*, there is a written disposition order requiring K.N.H. to cooperate with electronic monitoring and all conditions set by the court counselor. The parties do not dispute whether K.N.H. received oral notice of the condition to submit to electronic

monitoring. Rather, the parties disagree as to whether "all conditions set by the [c]ourt [c]ounselor" pursuant to the Supplemental Order were required to be in writing to be valid, particularly the condition that K.N.H. had to be in the presence of one of his parents while on electronic monitoring leave. Therefore, we do not find *In re E.M.* on point or persuasive in the case *sub judice*.

¶ 32 Our Court has held that a trial court may allow a juvenile court counselor to impose certain conditions and make certain determinations with respect to the juveniles they supervise so long as the court does not improperly delegate its authority when the statute provides the power and discretion to order a dispositional alternative or condition of probation is with the court. *See In re M.A.B.*, 170 N.C. App. 192, 194–95, 611 S.E.2d 886, 887–88 (2005) (affirming a disposition ordering a juvenile to "cooperate and participate in a residential treatment program as directed by [the] court counselor or mental health agency" where the "specifics of the day-to-day program" were left to the discretion of the court counselor); *In re Hartsock*, 158 N.C. App. 287, 291–92, 580 S.E.2d 395, 398–99 (2003) (reversing in part a dispositional order where the trial court ordered the juvenile to cooperate with placement in a residential treatment facility but vested counselors with the discretion of determining whether to order the placement).

¶ 33 In *In re S.R.S.*, we considered the underlying conditions of probation terms entered pursuant to N.C. Gen. Stat. § 7B-2510 and considered whether the trial court impermissibly delegated its authority in ordering those conditions. 180 N.C. App. 151, 157–60, 636 S.E.2d 277, 282–84 (2006). We noted that although the *S.R.S.* Court considered whether the trial court properly ordered conditions of probation under N.C. Gen. Stat. § 7B-2510, the case of *In re Hartsock*, 158 N.C. App. 287, 580 S.E.2d 395 (2004), which dealt with the trial court's discretion to order dispositional alternatives under N.C. Gen. Stat. § 7B-2506, was nevertheless "persuasive and applicable" to its analysis. *In re S.R.S.*, at 158, 636 S.E.2d at 283. The record in *In re S.R.S.* failed to support placing conditions on the juvenile for an out-of-home placement and cooperation with counseling and assessments as recommended by the court counselor. *Id.* at 159–60, 636 S.E.2d at 283–84. However, we upheld a condition of probation ordered by the trial court which stated that, "the juvenile abide by any rules set out by the Court Counselor and the juvenile's parents . . . ." *Id.* at 158–59, 636 S.E.2d at 283. We reasoned that the condition imposing rules set by a court did "not vary substantially from that allowed per [N.C. Gen. Stat. § 7B-2510(a)(3)]." *Id.* at 159, 636 S.E.2d at 283. We reversed the probation conditions for out-of-home placement and

cooperation with counseling and assessments in the event they were not already mooted by the expiration of the juvenile's probation term. *Id.* at 159–60, 636 S.E.2d at 283–84.

¶ 34 Here, the trial court continued K.N.H.'s Level 2 probation on 11 October 2018 for an additional 12-month period under the previously ordered terms and conditions in addition to new terms and conditions found in the Supplemental Order, including the condition that K.N.H. "submit to [e]lectronic [m]onitoring for 90 days and comply with all conditions set by the [c]ourt [c]ounselor." The trial court did not vary the condition of probation from that allowed by statute. *See In re S.R.S.*, 180 N.C. App. at 159, 636 S.E.2d at 283; *see also* N.C. Gen. Stat. § 7B-2510(b)(4). The trial court properly ordered electronic monitoring and appropriately delegated the task of supervision of the electronic monitoring to K.N.H.'s court counselor. The specific details concerning the electronic monitoring rules, after the condition of probation was ordered by the court, were properly delegated to the juvenile court counselor. *See In re M.A.B.*, 170 N.C. App. at 192, 611 S.E.2d at 886. Therefore, we hold the trial court properly entered a Level 3 disposition solely on K.N.H.'s violation of the specific terms and conditions set forth by the juvenile court counselor with respect to his electronic monitoring condition of probation.

VI. Oral Announcement of YDC Commitment Duration

¶ 35 **[2]** In his second argument, K.N.H. asserts the trial court erred in "fail[ing] to state with particularity the precise duration of [his] commitment to YDC in open court"; thus, "the Level 3 disposition must be vacated." The State contends this argument is moot since K.N.H. was released from the YDC on 1 June 2020 and placed on post-release supervision. Alternatively, the State argues that the trial court substantially complied with N.C. Gen. Stat. § 7B-2512, and K.N.H. cannot show prejudice resulting from the trial court's failure to include his "maximum commitment time in its oral pronouncement during the disposition."

A. Mootness

¶ 36 We first address the State's contention that K.N.H.'s challenge to the Level 3 disposition has been rendered moot on the basis that he was released from the YDC on 1 June 2020. The State argues that any error related to the disposition and commitment order cannot be cured since "[K.N.H.] already served his entire commitment at a [YDC]." We disagree. Although the record is unclear as to whether K.N.H. continues to be subject to post-release supervision, there remains a possibility he is under supervision, or faces another collateral legal consequence,

resulting from the alleged error. *See In re S.R.S*, 180 N.C. App. at 157–58, 636 S.E.2d at 282 (hearing a juvenile's arguments related to conditions of probation even though the Court of Appeals was uncertain whether the issues were mooted due to the juvenile's release from custody and probation).

¶ 37 Generally, "when the terms of a challenged trial court judgment have been carried out, a pending appeal of that judgment is moot because the appellate court decision cannot have any practical effect on the existing controversy." *In re A.K.*, 360 N.C. 449, 452, 628 S.E.2d 753, 755 (2006) (citation and quotation marks omitted). However, in cases where "the continued existence of the judgment itself may result in collateral legal consequences for the appellant" or where there are "[p]ossible adverse consequences flowing from [the] judgment," there continues to be a live controversy, which prevents the case from becoming moot. *Id.* at 452, 628 S.E.2d at 755. For example, a juvenile's appeal from a disposition and commitment order would not become moot where the juvenile served his sentence but faced a possibility of "adverse consequence flowing from a judgment," such as post-release supervision. *See id.* at 452, 629 S.E.2d at 755; *see also In re J.L.H.*, 230 N.C. App. 214, 219, 750 S.E.2d 197, 201 (2013) (holding a juvenile's appeal from a court's denial of his motion to release was not rendered moot by his release from commitment to a YDC where the juvenile had to comply with conditions of post-release supervision).

¶ 38 The State relies on *In re Swindell* as support for its argument that K.N.H.'s challenge to the trial court's oral pronouncement is rendered moot. 326 N.C. 473, 390 S.E.2d 134 (1990). In *In re Swindell*, the juvenile contended that the trial court erred in committing him "without first fully considering possible alternative treatment measures . . . ." *Id.* at 474, 390 S.E.2d at 135. Our Supreme Court held the issue was rendered moot since the juvenile had already been released from custody. *Id.* at 474, 390 S.E.2d at 135. The opinion makes no mention of the juvenile facing post-release supervision or any other "[p]ossible adverse consequences flowing from [the] judgment." *See In re A.K.*, 360 N.C. at 452, 629 S.E.2d at 755. Therefore, *In re Swindell* is distinguishable from the instant case, because here, a potential adverse consequence of the disposition on the juvenile—specifically, the possibility of post-release supervision—has been identified by the appellant, K.N.H.

¶ 39 Here, K.N.H.'s date of commitment was 23 May 2019, and he was released from the YDC on post-release supervision on 1 June 2020. The post-release supervision was to be in effect for a minimum of three months and maximum of one year. However, we are unable to deter-

mine, based on the record and its supplement, whether K.N.H. continues to be subject to post-custody supervision. Since it is possible K.N.H. continues to be on post-release supervision or faces other potentially adverse consequences from the purported sentencing error, we will hear the merits of his appeal although we are aware the "passage of time may have rendered the issue . . . moot." *In re Lineberry*, 154 N.C. App. 246, 256, 572 S.E.2d 229, 236 (2002) (recognizing the "passage of time may have rendered the issue of [a] juvenile's custody pending appeal moot").

B. Failure to Comply with N.C. Gen. Stat. §§ 7B-2513(a4) and 7B-2512(a)

¶ 40 On appeal, K.N.H. argues the trial court committed reversible and prejudicial error by not adhering to the statutory mandates set out in N.C. Gen. Stat. §§ 7B-2513(a4) and 7B-2512(a). Specifically, the trial court judge failed notify K.N.H. of the precise duration of his commitment to the YDC at the 23 May hearing when the court orally announced the disposition. The State concedes "the trial court did not include [K.N.H.'s] maximum commitment time in its oral pronouncement," but contends K.N.H. cannot show any prejudice resulting from the trial court's error. We agree with the State that the juvenile has not sufficiently shown prejudice stemming from the error.

¶ 41 As previously stated above, N.C. Gen. Stat. § 7B-2512 requires, *inter alia*, the courts to "state with particularity, both orally and in the written order of disposition, the precise terms of the disposition including the kind[and] duration . . . ." N.C. Gen. Stat. § 7B-2512(a). Similarly, N.C. Gen. Stat. § 7B-2513 provides, *inter alia*, "[a]t the time of commitment to a youth development center, the court shall determine the maximum period of time the juvenile may remain committed . . . and shall notify the juvenile of that determination." N.C. Gen. Stat. § 7B-2513(a4).

¶ 42 In this case, the trial court made the following pertinent statement in open court when it announced K.N.H.'s disposition:

> In this case, I'm going to commit the juvenile . . . to the Division of Adult Probation of Juvenile Justice for placement in a Youth Development Center for an indefinite period and order that you cooperate with all the recommendations for any counseling while in YDC, as well as on post-release; submit to random drug screens on post-release; and if the Chief Court Counselor requests it, I'll order you to submit to electronic monitoring for at least 60 days when placed on post-release supervision.

¶ 43 Since the trial court only provided the placement in the YDC would be for an "indefinite period," it failed to meet the statutory requirements to "determine the maximum period of time [K.N.H. was to] remain committed" and to state the "precise terms of the disposition including the . . . duration." *See* N.C. Gen. Stat. §§ 7B-2512(a), 7B-2513(a4).

C. Prejudicial Error

¶ 44 K.N.H. argues the trial court's failure in announcing the precise duration of his commitment was prejudicial because it "denied [him] the right to be present when the trial court selected his disposition," thus, he was "deprived of the opportunity to ask the judge questions about the Level 3 disposition."

¶ 45 We recognize North Carolina courts have made clear that the "State has a greater duty to protect the rights of a respondent in a juvenile proceeding than in a criminal proceeding." *State v. Fincher*, 309 N.C. 1, 24, 305 S.E.2d 685, 699 (1985) (citation omitted); *see also In re T.E.F.*, 359 N.C. 570, 614 S.E.2d 296 (2005); *In re Meyers*, 25 N.C. App. 555, 558, 214 S.E.2d 268, 270 (1975). However, we reject K.N.H.'s contention that any time "[a] trial court violates a statutory mandate at a [juvenile] dispositional hearing, the juvenile is not required to make a[ ] prejudice showing, as the error is prejudicial *per se*." *See In re J.L.B.M.*, 176 N.C. App. 613, 628, 627 S.E.2d 239, 248 (2006) (noting the trial court's violation of N.C. Gen. Stat. § 7B-2605 had "no effect on the juvenile's adjudication or disposition"); *In re J.J.*, 216 N.C. App. 366, 376, 717 S.E.2d 59, 66 (2011) (holding the trial court's failure to bifurcate its delinquency proceedings was non-prejudicial error).

¶ 46 K.N.H. maintains the trial court's failure to adhere to the statutory mandates constitutes reversible, prejudicial error and cities to *In re W.L.M.*, 218 N.C. App. 455, 721 S.E.2d 764, COA11-723, 2012 N.C. App. LEXIS 169 (N.C. App. Feb. 7, 2012) (unpublished opinion); *In re B.P.*, 169 N.C. App. 728, 612 S.E.2d 328 (2005); *In re J.L.B.M.*, 176 N.C. App. at 628, 627 S.E.2d at 248; and *In re T.E.F.*, 359 N.C. 570, 614 S.E.2d 296 (2005) as support for his argument. We find each case readily distinguishable from the facts of this case. We hold the trial court's error in failing to orally state the precise duration of the disposition was without prejudice.

¶ 47 In *In re W.L.M.*, which is unpublished, the trial court erred by failing to state in open court the duration of the juvenile's commitment and in erroneously recording the written order. 218 N.C. App. 455, 721 S.E.2d 764, COA11-723, 2012 N.C. App. LEXIS 169, at *2. The trial court initially checked the "indefinite commitment" box on the written disposition or-

der, then attempted to amend the commitment period on the order by crossing out the previously marked box and checking the "definite period" box "without designating a duration for that period." *Id.* at *3. We concluded that the modified written order did "not state the duration of confinement with certainty or particularity." *Id.* Our Court "vacate[d] the disposition portion of the order and remand[ed] for a new hearing." *Id.*

¶ 48 *In re B.P.* does not concern a juvenile dispositional order, but rather the timely entry of dispositional order entered after the court adjudicated a parent's minor children neglected and dependent. 169 N.C. App. at 730, 612 S.E.2d at 329–30 (2005). The pertinent portion of the statute in that case stated, "[t]he dispositional order shall be in writing, signed, and entered no later than 30 days from the completion of the hearing . . . ." *Id.* at 735, 612 S.E.2d at 333 (citing N.C. Gen. Stat. § 7B-905(a) (2003). Additionally, the statute required the disposition to state the "duration" and "the person who is responsible for carrying out the disposition and the person or agency in whom custody is vested." *Id.* at 735, 612 S.E.2d at 333; *see also* N.C. Gen. Stat. § 7B-905(a). The oral disposition announced in open court failed to indicate the "person or agency in whom custody is vested" and the "duration" of the order. *Id.* at 736, 612 S.E.2d at 333. Moreover, the written dispositional order was not timely filed as required by statute due to a clerical error. *Id.* at 735, 612 S.E.2d at 332–33. We held the respondent was prejudiced because she was "not provided with necessary information from which she could prepare for future proceedings" and had "no notice of the particular findings of fact or conclusions of law upon which the trial court based its decision." *Id.* at 736, 612 S.E.2d at 333.

¶ 49 In *In re J.L.B.M.*, the trial court properly orally announced the juvenile's commitment would not exceed his eighteenth birthday but omitted the maximum term of commitment from the written order as required under N.C. Gen. Stat. § 7B-2513(a). *In re J.L.B.M.*, 176 N.C. App. at 628, 627 S.E.2d at 249. We remanded the dispositional order to the trial court for correction of the clerical error. *Id.* at 628, 627 S.E.2d at 248.

¶ 50 In *In re T.E.F.*, our Supreme Court affirmed the Court of Appeal's decision to reverse and remand a matter to the trial court for a new juvenile adjudicatory hearing where the trial court had committed reversible error by not meeting all six requirements enumerated under N.C. Gen. Stat. § 7B-2407. *In re T.E.F.*, 359 N.C. at 572, 614 S.E.2d at 297. The Court reasoned that meeting all six requirements was "paramount and necessary in accepting a juvenile's admission as to guilt"; therefore, if any of the requirements are lacking, an adjudication based on the improper admission must be reversed. *Id.* at 574, 614 S.E.2d at 298. In declining to

adopt the "totality of the circumstances" standard of review, the Court emphasized the importance of ensuring juveniles understand the "consequences of admitting their guilt." *Id.* at 575–76, 614 S.E.2d at 299.

¶ 51 K.N.H. provides no case in which our Court held a reversible error had occurred solely based on the trial court's failure to orally announce the duration of the order of disposition, and we decline to do so here. Here, the written disposition order clearly indicated that K.N.H. was committed to the YDC for a minimum period of six months and a maximum period until his eighteenth birthday despite the trial court's failure to orally state the duration of the commitment. Furthermore, K.N.H. was apprised of the fact that he was being committed to the YDC at the 23 May 2019 hearing. Since only the Level 3 disposition authorizes commitment of a juvenile pursuant to the Juvenile Code, K.N.H. was present when the trial court selected his disposition, and he had the opportunity to ask the trial court judge questions about the disposition. *See* N.C. Gen. Stat. § 7B-2508(e) (2019). Although the trial court erred in orally stating the disposition, K.N.H. has not adequately shown that the statutory violations prejudiced him. *See In re Bullabough*, 89 N.C. App. 171, 178, 183, 365 S.E.2d 642, 646, 649 (1988) (holding the trial court's errors in unlawfully detaining the juvenile before the adjudication and in failing to direct the Clerk of the Superior Court to transcribe the record did not constitute reversible, prejudicial errors); *see also Glenn v. Raleigh*, 248 N.C. 378, 383, 103 S.E.2d 482, 487 (1958) (stating that in order to justify reversible error, a court's ruling must not only be erroneous, but also "material and prejudicial" so that a "different result would likely have ensued" but for the error).

VII. Conclusion

¶ 52 We hold the trial court did not err in basing its entry of the Level 3 disposition solely on K.N.H.'s violation of terms and conditions related to electronic monitoring, for which the juvenile received only oral notice from his court counselor. Furthermore, we hold the trial court erred in failing to follow the statutory mandate of orally stating the precise duration of the disposition at the time of commitment; however, the juvenile has failed to show that he was prejudiced by the error. For the foregoing reasons, we affirm the Order on Motion for Review and the Disposition and Commitment Order.

AFFIRMED.

Judges ZACHARY and MURPHY concur.

IN RE K.P.

[278 N.C. App. 42, 2021-NCCOA-268]

IN THE MATTER OF K.P.

No. COA20-797

Filed 15 June 2021

1. Child Abuse, Dependency, and Neglect—permanency planning—reunification eliminated as part of plan—sufficiency of findings

A permanency planning order granting custody of a child to non-relative custodians was vacated where the trial court effectively eliminated reunification with the mother as a plan without first making the necessary findings of fact pursuant to N.C.G.S. § 7B-906.2(b) and (d) regarding whether reunification would be unsuccessful or inconsistent with the child's safety. Further, the trial court erred by determining that the primary plan had been achieved because the initial primary plan was to give custody to a relative, and instead, the child was placed with non-relatives.

2. Child Abuse, Dependency, and Neglect—permanency planning—custody to non-relatives—understanding of legal significance—findings

In a permanency planning matter, the trial court erred when it awarded custody of the child to non-relative custodians without first ensuring that the custodians understood the legal significance of the placement and had adequate resources to care for the child as required by N.C.G.S. § 7B-906.1(j). Testimony from one of the custodians that he and his wife were willing to care for the child was insufficient.

3. Child Abuse, Dependency, and Neglect—permanency planning—ceasing further review hearings—findings

In a permanency planning matter, the trial court erred by ceasing further review hearings without first making findings of fact addressing each of the factors contained in N.C.G.S. § 7B-906.1(n).

Judge JACKSON concurring in part and dissenting in part.

Appeal by Appellant-Mother from an order entered 21 July 2020 by Judge Christopher B. McLendon in Hyde County District Court. Heard in the Court of Appeals 13 April 2021.

J. Thomas Diepenbrock for Appellant.

IN RE K.P.

[278 N.C. App. 42, 2021-NCCOA-268]

Rodman, Holscher, Peck & Edwards, P.A., by Jacinta D. Jones for Hyde County Department of Social Services.

Keith Karlsson for the Guardian ad Litem.

ARROWOOD, Judge.

¶ 1 Appellant, the mother of K.P. ("Kenneth"),[1] appeals from the trial court's permanency planning order granting legal and physical custody of Kenneth to non-relative custodians. Appellant contends that the trial court erred by (1) eliminating reunification as a primary or secondary permanent plan without making required findings of fact; (2) failing to make findings of fact supported by competent evidence that each of the proposed custodians understood the legal significance of their appointment; and (3) ceasing further reviews without making proper findings. For the following reasons, we vacate and remand.

I. Background

¶ 2 Kenneth, the youngest of Appellant's four children, was born 13 December 2017. Prior to Hyde County Department of Social Services' ("DSS") involvement, Kenneth and his siblings resided with Appellant and her husband, "Mr. Phillips." Mr. Phillips is the father of Kenneth's three siblings and was initially believed to be Kenneth's father.

¶ 3 On 17 March 2018, when Kenneth was three months old, Appellant and Mr. Phillips were involved in a domestic violence incident wherein Mr. Phillips returned home to find Appellant in bed with her paramour ("Mr. Keller"). Mr. Phillips "lunged" at Mr. Keller, who grabbed a nearby knife. Mr. Phillips took the knife from Mr. Keller and a physical altercation ensued, resulting in Mr. Keller being hospitalized. Kenneth and his siblings were present during the incident. As a result of the altercation, Mr. Phillips was arrested and charged with assault with a deadly weapon with a minor present, assault with a deadly weapon, and assault inflicting serious injury. Appellant, who had pending charges for resisting a public officer and probation violation, was also arrested and charged with simple assault. Before her arrest, Appellant arranged for Kenneth to be placed with a maternal aunt.

¶ 4 On 21 March 2018, DSS obtained a nonsecure custody order of Kenneth. DSS subsequently filed a petition alleging Kenneth to be a

1. Pseudonyms are used throughout the opinion to protect the identity of the parties involved.

neglected and dependent juvenile on 22 March 2018. Prior to filing the petition, DSS contacted Mr. Phillips who indicated that he was unsure if he could care for the children. Following a hearing on 27 March 2018, the court issued an order continuing nonsecure custody of Kenneth with DSS. During this time, Kenneth remained in the care of his maternal aunt until 22 May 2018, when the trial court ordered that Kenneth and his siblings be placed in the home of Mr. Phillips' father and stepmother, "Mr. Phillips, Sr." and "Mrs. Phillips," respectively.

¶ 5 At a subsequent nonsecure custody hearing held on 8 August 2018, the district court found that there was an issue as to the paternity of Kenneth and ordered Mr. Phillips to take a DNA test. Notwithstanding the paternity issue, the district court maintained Kenneth's placement with Mr. Phillips, Sr., and Mrs. Phillips. Test results later determined that Mr. Phillips was not Kenneth's biological father. Appellant subsequently named Mr. Keller as a potential father. Mr. Keller was ordered to take a DNA test, which confirmed that Mr. Keller, not Mr. Phillips, was Kenneth's biological father.

¶ 6 Thereafter, Kenneth was adjudicated neglected at an adjudication and disposition hearing on 10 December 2018. Appellant was ordered to participate in substance abuse treatment, domestic violence counseling, and anger management classes. The court also ordered her to maintain stable housing, obtain a valid driver's license and safe transportation, and attend visitation with her children.

¶ 7 Despite Mr. Phillips not being Kenneth's father, Kenneth remained placed with Mr. Phillips, Sr., and Mrs. Phillips until 17 July 2019, when he was moved to the home of his half-siblings' paternal step great-grandparents. During that time, the court held several permanency planning hearings in which it found that Appellant had completed parenting and anger management classes, admitted herself into an inpatient substance abuse treatment program, completed a substance abuse assessment, and maintained her sobriety.

¶ 8 In March 2019, Appellant resumed her romantic relationship with Mr. Phillips, and the two began residing with each other in April 2019 in a home that had "ample space for the parties' children." The couple later enrolled in family counseling. Following a permanency planning hearing on 20 August 2019, the court ordered that Kenneth begin trial home placement with Appellant and Mr. Phillips on 20 September 2019. The parties were scheduled to return to court for another permanency planning hearing on 10 December 2019. Moreover, at this point, the permanent plan for Kenneth remained the same as the court's decree fol-

lowing the 25 March 2019 permanency planning hearing: reunification with a concurrent plan of custody with a relative.

¶ 9 On 25 October 2019, Appellant told her social worker that Mr. Phillips had been physically and verbally abusing her for approximately one month. Appellant also informed the social worker that she had concerns about Mr. Phillips using drugs and the possibility of eviction due to Mr. Phillips' failure to pay rent. Upon further investigation, DSS determined that both Appellant and Mr. Phillips had been the perpetrators of the domestic discord at different times and that the juveniles were present during the altercations. As a result of these findings, the court held a placement review hearing on 29 October 2019 and determined that it was in Kenneth's and his siblings' best interest to terminate the trial home placement. Kenneth was removed and placed in the home of his maternal aunt following the 29 October 2019 hearing. After the termination of the trial home placement, Appellant relocated to Virginia to live with her mother, and Kenneth was returned to the home of Mr. Phillips, Sr., and Mrs. Phillips.

¶ 10 On 13 January 2020, the court held another permanency planning hearing. With regard to Appellant's circumstances, the court found that Appellant reported that she was working two jobs cleaning homes and delivering food, but she did not have a valid driver's license. The court also found that despite Appellant reporting that her monthly income was approximately $1,200.00, she had not provided DSS or the juvenile's placement with any financial assistance. Appellant also refused to submit to two hair follicle drug screens in October and December 2019.

¶ 11 Regarding Mr. Keller, the court found that he had left his inpatient substance abuse treatment program and secured his own housing. The court noted that Mr. Keller planned to find larger housing in order to gain custody of Kenneth and that Mr. Keller reported securing outside employment. The court also found that Mr. Keller had admitted to daily marijuana use to deal with stress and anger issues. Following the hearing, the court changed the primary permanent plan to custody with a relative with concurrent plans of custody to a court-approved caretaker and reunification.

¶ 12 This matter appeared for a final permanency planning hearing on 3 June 2020 in Hyde County Juvenile District Court. The trial court found that Appellant had refused another hair follicle drug test in January 2020, tested negative after submitting a hair follicle test in February 2020, and subsequently refused another drug screen in March 2020. The court also found that Appellant moved to Hertford, North Carolina to live with her

sister in April 2020, continued to clean houses as a source of income, and obtained a valid driver's license in May 2020. The district court acknowledged Appellant's request that Kenneth "be returned to her immediately while she lives in Hertford."

¶ 13 On 21 July 2020, the trial court entered an order granting legal and physical custody of Kenneth to Mr. Phillips, Sr., and Mrs. Phillips (the "Order") with supervised visitation to Appellant. The district court ceased further reviews and effectively ceased reunification efforts as there was no longer a permanent plan of reunification. The district court also released DSS, the *Guardian ad Litem* (the "GAL"), and the attorneys of record for Appellant from the matter. Lastly, the trial court determined that the primary permanent plan of custody had been achieved through the entry of the Order.

¶ 14 Appellant filed a timely notice of appeal of the Order on 18 August 2020.

II. Discussion

¶ 15 Appellant raises three arguments on appeal, asserting that the trial court erred by (1) eliminating reunification as a primary or secondary permanent plan without making required findings of fact; (2) failing to make findings of fact supported by competent evidence that each of the proposed custodians understood the legal significance of their appointment; and (3) ceasing further reviews without making proper findings. We address each argument in turn.

¶ 16 " 'Appellate review of a permanency planning order is limited to whether there is competent evidence in the record to support the findings and the findings support the conclusions of law.' " *In re R.A.H.*, 182 N.C. App. 52, 57-58, 641 S.E.2d 404, 408 (2007) (citation omitted) (quoting another source). "If the trial court's findings of fact are supported by any competent evidence, they are conclusive on appeal." *In re P.O.*, 207 N.C. App. 35, 41, 698 S.E.2d 525, 530 (2010) (citation omitted). We review the district court's conclusions of law *de novo*. *Id.* (citation omitted). Questions of statutory interpretation are questions of law, which we also review *de novo*. *In re P.A.*, 241 N.C. App. 53, 58, 772 S.E.2d 240, 245 (2015) (citation omitted). Lastly, we note that the trial court's "failure to make statutorily-mandated findings constitutes reversible error." *In re D.C.*, 275 N.C. App. 26, 29, 852 S.E.2d 694, 696 (2020) (citation omitted).

A. Reunification

¶ 17 **[1]** Appellant contends that the trial court erred by eliminating reunification as a primary or secondary permanent plan without first making

required findings of fact, particularly that reunification efforts clearly would be unsuccessful or would be inconsistent with the juvenile's health or safety in accordance with N.C. Gen. Stat. § 7B-906.2(b). We agree.

¶ 18 Section 7B-906.2(b) of our General Statutes provides, in part, the following:

> At any permanency planning hearing, the court shall adopt concurrent permanent plans and shall identify the primary plan and secondary plan. Reunification shall be a primary or secondary plan unless the court made findings under G.S. 7B-901(c) or G.S. 7B-906.1(d)(3), the permanent plan is or has been achieved in accordance with subsection (a1) of this section, or the court makes written findings that reunification efforts clearly would be unsuccessful or would be inconsistent with the juvenile's health or safety.

N.C. Gen. Stat. § 7B-906.2(b) (2019). In turn, subsections 7B-906.2(d)(1)-(4) of the Juvenile Code read as follows:

> At any permanency planning hearing under subsections (b) and (c) of this section, the court shall make written findings as to each of the following, which shall demonstrate the degree of success or failure toward reunification:
>
> (1) Whether the parent is making adequate progress within a reasonable period of time under the plan.
>
> (2) Whether the parent is actively participating in or cooperating with the plan, the department, and the guardian ad litem for the juvenile.
>
> (3) Whether the parent remains available to the court, the department, and the guardian ad litem for the juvenile.
>
> (4) Whether the parent is acting in a manner inconsistent with the health or safety of the juvenile.

N.C. Gen. Stat. § 7B-906.2(d)(1)-(4). This Court has made clear that when a district court eliminates reunification as either a primary or secondary

permanent plan, it must make findings pursuant to both N.C. Gen. Stat. §§ 7B-906.2(b) and (d). *See generally Matter of K.L.*, 254 N.C. App. 269, 280, 802 S.E.2d 588, 595 (2017). These requirements are coupled with the obligation codified in N.C. Gen. Stat. § 7B-906.1(d)(3), which states, in pertinent part, that, "At each hearing, the court shall consider the following criteria and make written findings regarding those that are relevant . . . [including] [w]hether efforts to reunite the juvenile with either parent clearly would be unsuccessful or inconsistent with the juvenile's health or safety and need for a safe, permanent home within a reasonable period of time." N.C. Gen. Stat. § 7B-906.1(d)(3) (2019).

¶ 19 Here, following the 3 June 2020 permanency planning hearing, the court determined that it was in Kenneth's best interest to be placed in the custody of Mr. Phillips, Sr., and Mrs. Phillips and that awarding custody of Kenneth to the couple would achieve the primary permanent plan of custody to a relative. However, in the 3 April 2020 permanency planning order, the district court ordered a primary permanent plan of custody to a relative with concurrent permanent plans of custody to a court-approved caretaker and also required reunification. To subsequently remove reunification as a concurrent permanent plan requires properly admitted evidence to support findings of fact to allow the court to conclude "efforts to reunite the juvenile with either parent clearly would be unsuccessful or inconsistent with the juvenile's health or safety and need for a safe, permanent home within a reasonable period of time." *See* N.C. Gen. Stat. § 7B-906.1(d)(3); *see also Matter of K.L.*, 254 N.C. App. at 275, 802 S.E.2d at 592. In addition, because the trial court implicitly ceased reunification efforts and omitted reunification from the permanent plan, it was required to satisfy N.C. Gen. Stat. § 7B-906.2(b). *Matter of D.C.*, 275 N.C. App. at 30, 852 S.E.2d at 697. Thus, without making proper findings of fact based on competent evidence pursuant to the aforesaid statutory provisions, the trial court erred by effectively ceasing reunification efforts in the Order.

¶ 20 DSS and the GAL argue, however, that reunification need not have been a primary or secondary plan because the permanent plan had been achieved. The 3 April 2020 order states that "[t]he primary permanent plan for the juvenile shall be custody to a ***relative*** with concurrent permanent plans of custody to a court-approved caretaker and reunification." (Emphasis added). Following the 3 June 2020 final permanency planning hearing, the district court concluded that the "primary permanent plan for the juvenile . . . ha[d] been achieved through the entry of th[e] [O]rder." The trial court's findings of fact do not support this conclusion; in fact, the district court's findings directly refute it. The

"primary permanent plan" for Kenneth was custody with a "*relative*." As noted above, after the 3 June 2020 hearing, the trial court awarded legal and physical custody to ***non-relatives*** Mr. Phillips, Sr., and Mrs. Phillips.[2] Thus it is implausible to conclude that the primary permanent plan had been achieved as the juvenile was placed in the custody of persons without any biological connection to Kenneth.

¶ 21 Moreover, the 3 April 2020 order suffers the same defect as the Order—it fails to address the ultimate question of whether reunification would be unsuccessful or inconsistent with Kenneth's safety. Because the trial court ceased reunification efforts without making sufficient findings pertinent to N.C. Gen. Stat. § 7B-906.2(d) and the ultimate findings required by N.C. Gen. Stat. §§ 7B-906.2(b) and 7B-906.1(d)(3), and because the trial court erroneously concluded that the primary permanent plan had been achieved through entry of the Order, we vacate and remand for further proceedings. *See Matter of D.A.*, 258 N.C. App. 247, 254, 811 S.E.2d 729, 734 (2018) (vacating order ceasing reunification efforts due to trial court's failure to include findings embracing the requisite ultimate question of whether reunification efforts clearly would be unsuccessful or would be inconsistent with the juvenile's health or safety); *cf. In re C.M.*, 183 N.C. App. 207, 213, 644 S.E.2d 588, 594 (2007) ("This Court reviews an order that ceases reunification efforts to determine whether the trial court made appropriate findings, whether the findings are based upon credible evidence, whether the findings of fact support the trial court's conclusions, and whether the trial court abused its discretion with respect to disposition.").

B. Verification

¶ 22 **[2]** Next, Appellant asserts that the trial court erred when it failed to make findings of fact supported by competent evidence that each of the proposed custodians (Mr. Phillips, Sr., and Mrs. Phillips) understood the legal significance of Kenneth's placement in their care. We agree and conclude that the trial court failed to fulfill its statutory obligation to verify that Mr. Phillips, Sr., and Mrs. Phillips (non-parents and non-relatives) understood the legal significance of their appointment as Kenneth's custodians. Section 7B-906.1(j) of our Juvenile Code states the following:

> If the court determines that the juvenile shall be placed in the custody of an individual other than a parent or appoints an individual guardian of the person pursuant to G.S. 7B-600, the court shall verify

2. Because Mr. Phillips is not Kenneth's biological father, neither Mrs. Phillips nor Mr. Phillips, Sr., are "relatives."

> that the person receiving custody or being appointed as guardian of the juvenile understands the legal significance of the placement or appointment and will have adequate resources to care appropriately for the juvenile.

N.C. Gen. Stat. § 7B-906.1(j). DSS and the GAL argue that this verification requirement was met in light of testimony from a DSS social worker and Mr. Phillips, Sr. We disagree.

¶ 23 This Court has explained "that N.C. Gen. Stat. § 7B-906.1(j) does not require the trial court to 'make any specific findings in order to make the verification.' " *Matter of J.D.M.-J.*, 260 N.C. App. 56, 65, 817 S.E.2d 755, 761 (2018) (citation omitted) (quoting another source). "However, we have made clear that the record must show the trial court received and considered reliable evidence that the guardian or custodian had adequate resources and understood the legal significance of custody or guardianship." *Id.* (citations omitted). In the *Matter of J.D.M.-J.*, this Court vacated the award of custody because neither of the custodians testified at the permanency planning hearing and because no evidence was offered by DSS confirming that the custodians understood the legal significance of assuming custody of the juveniles. *Id.* at 260 N.C. App. at 68, 817 S.E.2d at 757. Here, Mrs. Phillips did not testify at the final permanency planning hearing, and testimony elicited from Mr. Phillips, Sr., did not demonstrate that he understood the legal significance of Kenneth's placement nor that the couple had the adequate resources to care appropriately for the juvenile. During the 3 June 2020 permanency planning hearing, a DSS social worker testified as follows:

> Q: And have [Mr. Phillips, Sr., and Mrs. Phillips] expressed a desire to accept legal custody of [Kenneth]?
>
> A: Yes, they have.

Mr. Phillips, Sr., in turn, testified to the following:

> Q: And do you recall having conversations with the Department regarding taking custody of [Kenneth]?
>
> A: Yes, ma'am.
>
> Q: And are you and your wife willing to do that at this time?
>
> A. Yes, ma'am.

Q: And are you and your wife willing to provide permanence for [Kenneth] through a custody order?

A: Yes, ma'am.

As demonstrated above, Mr. Phillips, Sr., simply stated that he was willing to take custody of Kenneth. This testimony, even when coupled with the social worker's testimony that Mr. Phillips, Sr., and Mrs. Phillips "expressed a desire to accept legal custody" of Kenneth is insufficient to satisfy N.C. Gen. Stat. § 7B-906.1(j).

¶ 24 In short, neither the record at a whole nor the district court's findings of fact support the conclusion that Kenneth's custodians understood the legal significance of the placement or that they would have the adequate resources to care appropriately for the juvenile. Indeed, the Order is devoid of any mention of the matter. For these reasons, we vacate and remand for further evidentiary findings pursuant to N.C. Gen. Stat. § 7B-906.1(j). *See In re L.M.*, 238 N.C. App. 345, 348, 767 S.E.2d 430, 433 (2014) (concluding that evidence did not support a finding that the other potential guardian understood the legal significance of guardianship where she did not testify, sign a guardianship agreement, or otherwise demonstrate that she had accepted responsibility for the child); *see also Matter of E.M.*, 249 N.C. App. 44, 55, 790 S.E.2d 863, 872 (2016) (vacating award of legal custody and remanding where record was devoid of evidence indicating that custodian couple understood the legal significance of the juvenile's placement: "Here, the husband in the custodial couple did not testify, and there is no evidence to indicate that he understood the legal significance of taking custody of [juvenile]. Further, although his wife testified at the hearing, she never testified regarding her understanding of the legal relationship, and the court never examined her to determine whether she understands the legal significance of the relationship.").

C. Cessation of Further Review Hearings

¶ 25 **[3]** Appellant's final challenge is that because the Order provided that "[t]here shall be no further reviews of this matter[,]" the district court was statutorily obliged to make the required relevant findings of fact pursuant to N.C. Gen. Stat. § 7B-906.1(n). Because the district court failed to do so, Appellant assigns error to this portion of the Order, as well. DSS and the GAL concede this error on appeal.

¶ 26 "Review hearings after the initial permanency planning hearing shall be designated as permanency planning hearings." N.C. Gen. Stat. § 7B-906.1(a). Generally, "[p]ermanency planning hearings shall be held

at least every six months thereafter or earlier as set by the court to review the progress made in finalizing the permanent plan for the juvenile, or if necessary, to make a new permanent plan for the juvenile." *Id.* In addition, N.C. Gen. Stat. § 7B-906.1(n) reads as follows:

> Notwithstanding other provisions of this Article, the court may waive the holding of hearings required by this section, may require written reports to the court by the agency or person holding custody in lieu of review hearings, or order that review hearings be held less often than every six months if the court finds by clear, cogent, and convincing evidence each of the following:
>
> (1) The juvenile has resided in the placement for a period of at least one year or the juvenile has resided in the placement for at least six consecutive months and the court enters a consent order pursuant to G.S. 7B-801(b1).
>
> (2) The placement is stable and continuation of the placement is in the juvenile's best interests.
>
> (3) Neither the juvenile's best interests nor the rights of any party require that review hearings be held every six months.
>
> (4) All parties are aware that the matter may be brought before the court for review at any time by the filing of a motion for review or on the court's own motion.
>
> (5) The court order has designated the relative or other suitable person as the juvenile's permanent custodian or guardian of the person.

N.C. Gen. Stat. § 7B-906.1(n).

¶ 27 "Our statutes and cases require the trial court to address all five criteria, make findings of fact to support its conclusion, and hold its failure to do so is reversible error." *Matter of K.L.*, 254 N.C. App. at 284, 802 S.E.2d at 598 (citations omitted). DSS and the GAL concede that the trial court failed to comply with the mandatory provisions of this statute. This uncontested error provides an additional, disjunctive reason to vacate the Order.

III. Conclusion

¶ 28 For the foregoing reasons, we vacate the district court's 21 July 2020 permanency planning order and remand for further findings consistent with this opinion.

VACATED AND REMANDED.

Chief Judge STROUD concurs.

Judge JACKSON concurs in part and dissents in part.

JACKSON, Judge, concurring in part and dissenting in part.

¶ 29 I join the portion of the majority's opinion holding that the trial court's order failed to comply with the mandatory making of findings of fact pursuant to N.C. Gen. Stat. § 7B-906.1(n) before concluding that there should be no further reviews of the matter, as DSS and the GAL concede. However, I respectfully dissent from the portions of the majority opinion concerning reunification and verification.

¶ 30 The majority opinion does a good job of listing out the relevant facts contained in the record with one exception: that Kenneth was thriving in his current placement and received appropriate care and supervision, and that Mr. Phillips Sr. and Mrs. Phillips had demonstrated a commitment to serving as a permanent placement for the child.

I. Analysis

¶ 31 Generally, "[t]his Court reviews an order that ceases reunification efforts to determine whether the trial court made appropriate findings, whether the findings are based upon credible evidence, whether the findings of fact support the trial court's conclusions, and whether the trial court abused its discretion with respect to disposition." *In re C.M.*, 183 N.C. App. 207, 213, 644 S.E.2d 588, 594 (2007). "An abuse of discretion occurs when the trial court's ruling is so arbitrary that it could not have been the result of a reasoned decision." *In re N.G.*, 186 N.C. App. 1, 10-11, 650 S.E.2d 45, 51 (2007) (internal marks and citations omitted), *aff'd per curiam*, 362 N.C. 229, 657 S.E.2d 355 (2008). "The trial court's conclusions of law are reviewed *de novo* on appeal." *In re K.L.*, 254 N.C. App. 269, 272-73, 802 S.E.2d 588, 591 (2017). "The failure to make statutorily-mandated findings constitutes reversible error." *In re D.C.*, 852 S.E.2d 694, 696 (N.C. Ct. App. 2020).

A. Cessation of Reunification

¶ 32 Respondent contends that the trial court was required to make written findings that reunification efforts clearly would be unsuccessful or would be inconsistent with the juvenile's health or safety in accordance with N.C. Gen. Stat. § 7B-906.2(b). The majority agrees and additionally finds that the trial court failed to include findings that correspond with the requirements of N.C. Gen. Stat. § 7B-906.2(d). DSS and the GAL, on the other hand, argue that the court was not required to make findings pursuant to § 7B-906.2(b), because the court found that the primary permanent plan was achieved by entry of the 3 June 2020 order. I agree with DSS and the GAL that the trial court's order fully complied with § 7B-906.2(b) and further agree with Respondent that the order includes sufficient findings that correspond to the requirements of § 7B-906.2(d).

¶ 33 Section 7B-906.2(b) of the North Carolina General Statutes provides that

> [r]eunification shall be a primary or secondary plan unless the court made findings under G.S. 7B-901(c) or G.S. 7B-906.1(d)(3), the permanent plan is or has been achieved in accordance with subsection (a1) of this section, *or* the court makes written findings that reunification efforts clearly would be unsuccessful or would be inconsistent with the juvenile's health or safety.

N.C. Gen. Stat. § 7B-906.2(b) (2019) (emphasis added).

¶ 34 This Court has recognized that "or" signifies an option in the statute. *See In re D.C.*, 852 S.E.2d at 697. Thus, reunification shall be a primary or secondary plan unless one of three circumstances exist: (1) the court made findings under N.C. Gen. Stat. §§ 7B-901(c) or 7B-906.1(d)(3); (2) the permanent plan is or has been achieved; or (3) the court makes written findings that reunification efforts clearly would be unsuccessful. N.C. Gen. Stat. § 7B-906.2(b) (2019).

¶ 35 Circumstance two, as outlined in the statute, is relevant here and provides that the court may cease reunification efforts if "the permanent plan is or has been achieved in accordance with subsection (a1) of this section[.]" N.C. Gen. Stat. § 7B-906.2(b) (2019). To that end, subsection (a1) provides that "[c]oncurrent planning shall continue until a permanent plan is or has been achieved." *Id.* § 7B-906.2(a1). In interpreting this portion of the statute, our Court has previously held, in an unpublished opinion, that "under § 7B-906.2(a1), reunification efforts may be ceased

simply upon completion of one of the juvenile's permanent plans—and consequently, that completion of a permanent plan means that no specific factual findings are required under § 7B-906.2(b)." *In re E.Y.B. & G.*, 2021-NCCOA-64, 2021 N.C. App. LEXIS 209, at *55 (2021).

¶ 36 Here, after the first permanency planning hearing on 25 March 2019, Kenneth was assigned a primary permanent plan of reunification, with a concurrent plan of custody with a relative. In a subsequent permanency planning hearing on 20 August 2019, the permanent plan remained the same. Following the 13 January 2020 permanency planning hearing, however, Kenneth was assigned a primary permanent plan of custody to a relative, with a concurrent permanent plan of custody to a court-approved caretaker and reunification. Finally, during the 3 June 2020 permanency planning hearing, the court determined that it was in Kenneth's best interest to be placed in the custody of Mr. Phillips Sr. and Mrs. Phillips, and that awarding custody of Kenneth to the couple would achieve the primary plan of custody to a court-approved caretaker.[1]

¶ 37 In making its decision, the trial court considered a number of factors, including "[w]hether efforts to reunite the juvenile with either parent would be unsuccessful or inconsistent with the juvenile's health or safety and need for a safe, permanent home within a reasonable time." N.C. Gen. Stat. § 7B-906.1(d)(3) (2019). Specifically, the trial court found:

> a. The juvenile is currently placed in the home of paternal step-grandfather and step-grandmother[.] . . . He has been in the [Phillips Sr.] home since November 1, 2019, but was also previously placed in their home prior to Respondent-Mother beginning a trial home placement in August 2019. The juvenile is receiving appropriate care in his current placement and is in

1. The majority contends that it was implausible to grant non-relative custody of Kenneth when the court had previously determined in a prior permanency planning hearing that the primary plan for Kenneth was custody to a relative. However, the majority overlooks failed attempts by the court to place Kenneth with his parents and relatives. Specifically, the court arranged for a home placement with Respondent, which lasted for approximately two months. Thereafter, the court removed Kenneth due to abuse in Respondent's household and placed him with his maternal aunt. Kenneth remained with his aunt for approximately one month before the court ordered that Kenneth be placed with Mr. Phillips Sr. and Mrs. Phillips. Kenneth's biological father also expressed his consent to Kenneth being placed in the legal and physical custody of the Phillips and believes their home is appropriate. Thus, given the history of this case, and the discretion given to courts to adopt a permanent plan in the juvenile's best interest, it was not implausible for the court to change the permanent plan from custody with a relative to custody by an approved caretaker.

> the least restrictive, most family-like setting available to him.
>
> b. The present risk of harm to the juvenile if returned [to] either of the [R]espondent parents' homes is high. Respondent-[F]ather continues to struggle with substance abuse issues despite obtaining stable housing and employment. Respondent-Mother continues to have instability of housing and employment. She has not been compliant with all requests for random drug screens. It is not possible for the juvenile to be returned to the home of either parent immediately, not is it possible that the juvenile could be returned to the home of either parent within the next six (6) months.
>
> c. While these placement [sic] was determined based upon the needs of the juvenile and factors concerning the juvenile's health and welfare, the circumstances are such that they should continue as previously established until a permanent plan is achieved.

¶ 38 Thus, by awarding custody of Kenneth to court-approved caretakers, Mr. Phillips Sr. and Mrs. Phillips, and achieving Kenneth's permanent plan in accordance with § 7B-906.2(a1), the trial court was not required to also find that reunification efforts clearly would be unsuccessful or would be inconsistent with Kenneth's health or safety pursuant to § 7B-906.2(b).[2] Accordingly, the trial court's order satisfied § 7B-906.2(b) and no additional findings were required.

¶ 39 By eliminating reunification as the primary or secondary permanent plan, the court was required to also make findings pursuant to of N.C. Gen. Stat. § 7B-906.2(d). *In re K.L.*, 254 N.C. App. 269, 280-282, 802 S.E.2d 588, 595-596 (2017). N.C. Gen. Stat. § 7B-906.2(d) provides:

> At any permanency planning hearing under subsections (b) and (c) of this section, the court shall make written findings as to each of the following, which shall demonstrate the degree of success or failure toward reunification:

---

2. Although the court was not required to make findings that efforts to reunite Kenneth with his parents would be unsuccessful or inconsistent with Kenneth's health or safety pursuant to § 7B-906.2(b), the court did, in fact, address this factor—satisfying § 7B-906.1(d)(3), contrary to the majority's conclusion.

> (1) Whether the parent is making adequate progress within a reasonable period of time under the plan.
>
> (2) Whether the parent is actively participating in or cooperating with the plan, the department, and the guardian ad litem for the juvenile.
>
> (3) Whether the parent remains available to the court, the department, and the guardian ad litem for the juvenile.
>
> (4) Whether the parent is acting in a manner inconsistent with the health or safety of the juvenile.

N.C. Gen. Stat. § 7B-906.2(d) (2019).

¶ 40 While Respondent concedes that the order includes findings that correspond to § 7B-906.2(d), the majority found that said findings were omitted from the order. The trial court did, however, make sufficient findings pertinent to § 7B-906.2(d). Below, the language from the statute is compared side-by-side with the corresponding findings of fact from the trial court's order (in italics):

(1) Whether the parent is making adequate progress within a reasonable period of time under the plan.	*Respondent-Father continues to struggle with substance abuse issues despite obtaining stable housing and employment. Respondent-Mother continues to have instability of housing and employment. She had not been compliant with all requests for random drug screens . . . Neither parent has made sufficient progress in a reasonable period of time such that the juvenile can be returned to them immediately or within the next six (6) months.*
(2) Whether the parent is actively participating in or cooperating with the plan, the department, and the guardian ad litem for the juvenile.	*The respondent parents have attended services but they have been unable to demonstrate changes such that they can immediately care for the juvenile,*

(3) Whether the parent remains available to the court, the department, and the guardian ad litem for the juvenile.	*The parents are generally available to the Court, DSS, or the GAL to work their case plan*
(4) Whether the parent is acting in a manner inconsistent with the health or safety of the juvenile.	*The respondent parents have acted inconsistent with the juveniles' health and safety.*[3]

¶ 41 I believe this chart demonstrates that the trial court's order contained all the key factors from § 7B-906.2(d), even though the majority holds otherwise. Accordingly, the trial court's order also satisfied § 7B-906.2(d). Thus, I would affirm the trial court's order on the issue of reunification.

B. Verifying Legal Significance and Adequate Resources

¶ 42 Next, Respondent asserts that because the trial court placed Kenneth in the custody of Mr. Phillips Sr. and Mrs. Phillips, non-parents, the court was required to verify that the couple understood the legal significance of the placement. The majority agrees and concludes the trial court failed to do this properly, adding that the trial court also failed to verify that the guardians had adequate resources to care for Kenneth. This argument, however, is unavailing because testimony from the social worker and Mr. Phillips Sr. demonstrates that the couple understood the legal significance of the appointment, and Kenneth's stable placement with Mr. Phillips Sr. and Mrs. Phillips for seven consecutive months demonstrates the couple had adequate resources to care for Kenneth.

¶ 43 Section 7B-906.1(j) provides:

> [i]f the court determines that the juvenile shall be placed in the custody of an individual other than a parent or appoints an individual guardian of the person pursuant to G.S. 7B-600, the court shall verify that the person receiving custody or being appointed as guardian of the juvenile understands the legal significance of the placement or appointment and will have adequate resources to care appropriately for the juvenile. *The fact that the prospective custodian*

3. In support of this finding, the trial court detailed the progress and shortcomings of each parent in the order.

> *or guardian has provided a stable placement for the juvenile for at least six consecutive months is evidence that the person has adequate resources.*

N.C. Gen. Stat. § 7B-906.1(j) (2019) (emphasis added).

¶ 44 Our Court has explained

> that N.C. Gen. Stat. § 7B-906.1(j) does not require the trial court to make any specific findings in order to make the verification. However, we have made clear that the record must show the trial court received and considered reliable evidence that the guardian or custodian had adequate resources and understood the legal significance of custody or guardianship.

In re J.D.M.-J., 260 N.C. App. 56, 65, 817 S.E.2d 755, 761 (2018) (internal marks and citation omitted).

> Evidence sufficient to support a factual finding that a potential guardian understands the legal significance of guardianship can include, *inter alia*, testimony from the potential guardian of a desire to take guardianship of the child, the signing of a guardianship agreement acknowledging an understanding of the legal relationship, and testimony from a social worker that the potential guardian was willing to assume legal guardianship.

Id. at 68, 817 S.E.2d at 763.

¶ 45 Here, during the 3 June 2020 permanency planning hearing, the social worker testified as follows:

> Q: And have [Mr. Phillips Sr. and Mrs. Phillips] expressed a desire to accept legal custody of [Kenneth]?
>
> A: Yes, they have.

¶ 46 Mr. Phillips Sr. also testified as follows:

> Q: And do you recall having conversations with the Department regarding taking custody of [Kenneth]?
>
> A: Yes, ma'am.
>
> Q: And are you and your wife willing to do that at this time?

A: Yes, ma'am.

Q: And are you and your wife willing to provide permanence for [Kenneth] through a custody order?

A: Yes, ma'am.

¶ 47 The testimony of Mr. Phillips Sr., coupled with the testimony from the social worker, demonstrate that Mr. Phillips Sr. and Mrs. Phillip understood the legal significance of the appointment—as both the social worker and Mr. Phillips Sr. testified as to the couple's understanding of the appointment. Mrs. Phillips was not required to testify—indeed, Mr. Phillips Sr. was not required to testify either, as a social worker's testimony regarding a caretaker's understanding, alone, is sufficient evidence to support a factual finding that a potential guardian understands the legal significance of the appointment. *See In re J.D.M.-J.*, 260 N.C. App. at 68, 817 S.E.2d at 763 (emphasizing that testimony from a social worker that the potential guardian was willing to assume legal guardianship is sufficient evidence to support a factual finding that a potential guardian understands the legal significance of the guardianship); *See also* N.C. Gen. Stat. § 7B-906.1(c) (2019) ("The court may consider any evidence, including hearsay evidence . . . that the court finds to be relevant, reliable, and necessary to determine the needs of the juvenile and the most appropriate disposition.").

¶ 48 Because the court was not required to make specific findings regarding the couple's understanding, and the record contained testimony from the social worker and Mr. Phillips Sr. acknowledging the couple's understanding of the legal significance of custody, I believe the court properly verified that Mr. Phillips Sr. and Mrs. Phillips understood the legal significance of their appointment in compliance with N.C. Gen. Stat. § 7B-906.1(j).

¶ 49 The majority also finds that the trial court failed to determine if Mr. Phillips Sr. and Mrs. Phillips possessed adequate resources to care appropriately for the juvenile. In making this determination, the majority omits the last sentence of N.C. Gen. Stat. § 7B-906.1(j), which provides that "[t]he fact that the prospective custodian or guardian has provided a stable placement for the juvenile for at least six consecutive months is evidence that the person has adequate resources." N.C. Gen. Stat. § 7B-906.1(j) (2019).

¶ 50 Here, prior to the 3 June 2020 permanency planning hearing, Kenneth had resided with Mr. Phillips Sr. and Mrs. Phillips for seven consecutive months (beginning 1 November 2019), after the court had

terminated Respondent's trial home placement. During Kenneth's time with the Phillips, the court found that Kenneth was "receiving appropriate care in his current placement and [wa]s in the least restrictive, most family-like setting available to him." Moreover, during the permanency planning hearing, Mr. Phillips Sr. provided the following testimony regarding his finances:

> Q: And if I may ask, Mr. Phelps, what is an estimate of your annual salary?
>
> A: It depends year to year. I think last year was fifty-six, I think, something like that.
>
> Q: And since having [Kenneth] in your home, have you and your wife experienced any difficulty in financially caring for him?
>
> A: No.
>
> Q: Do you anticipate having any financial difficulty in continued care of [Kenneth]?
>
> A: No; no, ma'am.
>
> Q: And have you been caring for [Kenneth] without any substantial financial contributions from the parents?
>
> A: No.
>
> Q: No contributions?
>
> A: No.

¶ 51 Again, the trial court was not required to make specific findings regarding the Phillips' ability to provide adequate resources. Indeed, the record demonstrated that Kenneth retained a stable placement with the Phillips for at least six consecutive months—establishing that the couple possessed adequate resources to care for Kenneth—and Mr. Phillips Sr. was gainfully employed with resources to support Kenneth, without any help from Respondent or Kenneth's biological father. *See* N.C. Gen. Stat. § 7B-906.1(j) (2019). Thus, I would affirm the trial court's order on this issue of verification.

II. Conclusion

¶ 52 Altogether, the trial court did not err in eliminating reunification as a primary or secondary permanent plan, because the order contained all the statutorily required findings of fact. Moreover, the court did not

err in placing Kenneth with Mr. Phillips Sr. and Mrs. Phillips because testimony in the record revealed that the couple understood the legal significance of their appointment and possessed adequate resources to care for Kenneth. Because the majority has concluded otherwise on both issues, I respectfully dissent as to the Court's holdings on reunification and verification.

CATHERINE KINCHELOE (WILKINSON), PLAINTIFF
v.
JOHN KINCHELOE, DEFENDANT

No. COA20-34

Filed 15 June 2021

1. Child Custody and Support—child support—N.C. Child Support Guidelines—deviation—required findings of fact

A child support order was reversed and remanded where the trial court deviated from the N.C. Child Support Guidelines—by excluding the father's substantial work bonuses from his gross income for purposes of calculating child support—but failed to enter the factual findings required under N.C.G.S. § 50-13.4(c) to support the deviation and to permit appellate review of the child support calculation. Specifically, the court entered insufficient findings regarding the reasonable needs of the children, and its finding regarding the presumptive child support amount under the Guidelines was incomplete because it was based on an incorrect calculation of the father's gross income.

2. Child Custody and Support—child support—calculation—mother's gross income—double-counting expenses—insufficient findings

The trial court's child support calculation was reversed and remanded where, although the court correctly treated housing and utilities support that the maternal grandmother provided the mother as part of the mother's gross income, the court's minimal findings of fact made it impossible to determine on appeal whether the trial court improperly double counted the grandmother's financial support as both the mother's income and a reduction of her living expenses, which in turn precluded appellate review of the court's deviation from the N.C. Child Support Guidelines.

3. Child Custody and Support—child support—consent order—arrears calculation—insufficient findings

In a child support action, where the parents had previously entered into a consent order requiring the father to pay monthly child support, alimony, the children's uninsured medical expenses, and the costs of "agreed-upon extracurricular activities" for the children, the trial court's child support order was reversed and remanded where the court held that the mother owed the father for overpayment of child support and unreimbursed expenses but failed to enter sufficient factual findings to support its calculation of arrears.

Appeal by plaintiff from order entered 10 July 2019 by Judge Aretha V. Blake in District Court, Mecklenburg County. Heard in the Court of Appeals 9 September 2020.

Plumides, Romano, Johnson & Cacheris, P.C., by Richard B. Johnson, for plaintiff-appellant.

Myers Law Firm, PLLC, by Matthew R. Myers, for defendant-appellee.

STROUD, Chief Judge.

¶ 1 Mother appeals an order modifying child support. Mother argues the trial court abused its discretion by excluding Father's bonus income from his gross income for purposes of calculation of child support and by double-counting support provided by her mother as both income and a reduction of her living expenses. Mother contends the trial court erred by deviating from the North Carolina Child Support Guidelines without making the required findings. In addition, Mother contends the trial court erred by determining Mother owed Father for overpayment of child support and reimbursement of expenses not supported by the evidence. We conclude the trial court erred by failing to make sufficient findings to support deviation from the North Carolina Child Support Guidelines and by failing to make sufficient findings to allow appellate review of the child support amount and arrears established. We reverse and remand the trial court's order for entry of a new order with appropriate findings and conclusions of law.

I. Background

¶ 2 Mother and Father had two children during their marriage. In 2013, the parties separated. Mother filed a complaint with claims for child

custody, child support, post-separation support, alimony, and equitable distribution. Father filed an answer and counterclaims for custody, child support, and equitable distribution. In December 2013, Mother and Father entered into a consent order resolving their claims of child custody, child support, and equitable distribution ("2013 Consent Order"). The 2013 Consent Order did not include detailed findings regarding the parties' incomes and calculation of child support but noted the parties had agreed upon the calculation based upon their incomes and the costs of medical and dental insurance provided by Father. The parties stipulated that the child support of $820.00 per month was "a compromise and shall not be deemed to be a deviation from the Guidelines." Father was ordered to pay the child support "bi-weekly by bank transfer." The 2013 Consent Order also provided for Father to maintain medical and dental insurance for the children; to pay 60% of any uninsured expenses; and to pay 60% of "the costs of all agreed-upon extracurricular activities." The 2013 Consent Order also noted that the parties would enter into a separate agreement regarding post-separation support and alimony and Mother would dismiss these claims.

¶ 3 On 23 May 2017, Mother filed a motion to modify child custody, to increase child support, and to appoint a parenting coordinator. Mother alleged the existing child support order was over three years old and she believed child support would increase by more than 15% based upon "the parties' incomes and child-related expenses." Father filed a response, alleging upon information and belief that the child support amount should be decreased. The parties agreed to a temporary consent order modifying child custody and appointing a parenting coordinator. Father filed a motion to deviate from the child support guidelines, alleging that guideline child support "may exceed the reasonable needs of the children or would otherwise be unjust or inappropriate." Mother filed a motion for wage garnishment and to determine child support arrears and attorney's fees. She alleged Father had failed to pay the full amount of his child support in various months when he deducted "what he believes, [Mother] owes him for various medical and extracurricular expenses."

¶ 4 There were multiple hearings on the various motions before the trial court. The trial court heard the motions of both parties regarding child support, wage garnishment, determination of arrears, and deviation from the Child Support Guidelines on 26 June and 14 September 2018. The trial court entered its order addressing these motions on 10 July 2019 ("2019 Order"). The 2019 Order reduced Father's monthly child support to $471.36 per month as of 1 October 2018 and also re-

quired him to pay 2% of his annual bonus within 30 days of receipt. The order determined Mother owed Father $5,313.44 for overpayment of child support and unreimbursed expenses. The order also changed the allocation of the uninsured medical expenses and "agreed-upon extra-curricular activities" to 66% paid by Father and 34% paid by Mother. Mother timely appealed.

II. North Carolina Child Support Guidelines

¶ 5 Mother argues many of the trial court's findings are not supported by the evidence and that the trial court failed to make the findings necessary to support its decision to deviate from the Child Support Guidelines and findings adequate to permit review of the trial court's calculation of child support.

A. Standard of Review

¶ 6 This Court's standard of review of an order establishing child support based upon a deviation from the child support guidelines is well established:

> A trial court's deviation from the Guidelines is reviewed under an abuse of discretion standard.
>
> Nevertheless, in deviating from the Guidelines, a trial court must follow a four-step process:
>
> > First, the trial court must determine the presumptive child support amount under the Guidelines. Second, the trial court must hear evidence as to the reasonable needs of the child for support and the relative ability of each parent to provide support. Third, the trial court must determine, by the greater weight of this evidence, whether the presumptive support amount would not meet or would exceed the reasonable needs of the child considering the relative ability of each parent to provide support or would be otherwise unjust or inappropriate. Fourth, following its determination that deviation is warranted, in order to allow effective appellate review, the trial court must enter written findings of fact showing the presumptive child support amount under the Guidelines; the reasonable needs of the child; the relative ability of each

> party to provide support; and that application of the Guidelines would exceed or would not meet the reasonable needs of the child or would be otherwise unjust or inappropriate.

Spicer v. Spicer, 168 N.C. App. 283, 292, 607 S.E.2d 678, 685 (2005) (citation omitted) (quoting *Sain v. Sain*, 134 N.C. App. 460, 465-66, 517 S.E.2d 921, 926 (1999)).

B. Deviation

¶ 7 **[1]** The findings of fact and conclusions of law required in an order setting child support based upon the reasonable needs of the child and relative abilities of the parents to pay support are more detailed than those required for an order based upon the Child Support Guidelines:

> "If the trial court imposes the presumptive amount of child support under the Guidelines, it is not . . . required to take any evidence, make any findings of fact, or enter any conclusions of law 'relating to the reasonable needs of the child for support and the relative ability of each parent to [pay or] provide support.' " "However, upon a party's request that the trial court deviate from the Guidelines . . . or the court's decision on its own initiative to deviate from the presumptive amounts . . . [,] the court must hear evidence and find facts related to the reasonable needs of the child for support and the parent's ability to pay." In other words, "evidence of, and findings of fact on, the parties' income, estates, and present reasonable expenses are necessary to determine their relative abilities to pay." In the course of making the required findings, "the trial court must consider 'the reasonable needs of the child for health, education, and maintenance, having due regard to the estates, earnings, conditions, accustomed standard of living of the child and the parties, the child care and homemaker contributions of each party, and other facts of the particular case.' " "These 'factors should be included in the findings if the trial court is requested to deviate from the [G]uidelines.' " As a result, given that Defendant requested the trial court to deviate from the child support guidelines, the trial court was required to "hear evidence and find facts

> related to the reasonable needs of the child for support and the parent's ability to pay."

Ferguson v. Ferguson, 238 N.C. App. 257, 260-61, 768 S.E.2d 30, 33-34 (2014) (alterations in original) (citations omitted).

¶ 8 Mother argues, "the trial court abused its discretion by deviating from the North Carolina Child Support Guidelines by reducing [Father's] payment from his annual bonus from 5.1% to 2%."[1] (Original in all caps.) Although the trial court has substantial discretion in setting the amount of child support, if the child support is based upon a deviation from the child support guidelines, the trial court must follow the "four-step process" for this determination. *Spicer*, 168 N.C. App. at 292, 607 S.E.2d at 685. The findings of fact must be sufficient to allow appellate review of the calculation. *Id.*

> Our Supreme Court has explained that "an order for child support must be based upon the interplay of the trial court's conclusions of law as to (1) the amount of support necessary to 'meet the reasonable needs of the child' and (2) the relative ability of the parties to provide that amount." These conclusions must in turn be based on factual findings "specific enough to indicate to the appellate court that the judge below took due regard of the particular estates, earnings, conditions, [and] accustomed standard of living of both the child and the parents." Without sufficient findings, an appellate court has no means of determining whether the order is adequately supported by competent evidence. The Court stressed that "[i]t is not enough that there may be evidence in the record sufficient to support findings which could have been made. The trial court must itself determine what pertinent facts are actually established by the evidence before it . . . ."

Id. at 293, 607 S.E.2d at 685 (alterations in original) (citations omitted) (quoting *Coble v. Coble*, 300 N.C. 708, 712, 268 S.E.2d 185, 189 (1980)).

¶ 9 Here, the 2019 Order addresses only part of the first step of the four-step process described in the Child Support Guidelines. The trial

1. The trial court found Guideline Child support based upon Father's *base* monthly income of $9,216.00 would be $471.364. The trial court found "[i]f Father were to pay 5.1% of his 2017 bonus to Mother, the amount would have been $9,690.00." The trial court determined that 5.1% of Father's bonus "would exceed the reasonable needs of the children" and ordered that he pay 2% of his bonus.

court did not follow the statutory procedure for establishing child support set forth in North Carolina General Statute § 50-13.4.

> The court shall determine the amount of child support payments by applying the presumptive guidelines established pursuant to subsection (c1) of this section. However, upon request of any party, the Court shall hear evidence, and from the evidence, find the facts relating to the reasonable needs of the child for support and the relative ability of each parent to provide support. If, after considering the evidence, the Court finds by the greater weight of the evidence that the application of the guidelines would not meet or would exceed the reasonable needs of the child considering the relative ability of each parent to provide support or would be otherwise unjust or inappropriate the Court may vary from the guidelines. If the court orders an amount other than the amount determined by application of the presumptive guidelines, the court shall make findings of fact as to the criteria that justify varying from the guidelines and the basis for the amount ordered.

N.C. Gen. Stat. § 50-13.4(c) (2019).

¶ 10 North Carolina General Statute § 50-13.4 sets forth two methods of determining child support. The first and presumptive method is the Child Support Guidelines. N.C. Gen. Stat. § 50-13.4(c). There is a presumption that child support will be established under the Child Support Guidelines in cases where the parties' incomes fall within the range addressed by the Guidelines. N.C. Child Support Guidelines, AOC-A-162, at 1 (2019) ("North Carolina's child support guidelines apply as a rebuttable presumption in all legal proceedings involving the child support obligation of a parent . . . ."). The Guidelines define "gross income" and if the parties' joint gross incomes fall above the Guidelines, the Guidelines do not apply. *Id*. at 2 ("In cases in which the parents' combined adjusted gross income is more than $30,000 per month ($360,000 per year), the supporting parent's basic child support obligation cannot be determined by using the child support schedule.").

> If the trial court imposes the presumptive amount of child support under the Guidelines, it is
>
> > not . . . required to take any evidence, make any findings of fact, or enter any conclusions

> of law "relating to the reasonable needs of the child for support and the relative ability of each parent to [pay or] provide support."

Biggs v. Greer, 136 N.C. App. 294, 297, 524 S.E.2d 577, 581 (2000) (alterations in original) (quoting *Browne v. Browne*, 101 N.C. App. 617, 624, 400 S.E.2d 736, 740 (1991)).

¶ 11 The trial court must use the second method to calculate child support when the Guidelines do not apply because the parties' incomes fall above the Guidelines or when the trial court determines deviation from the Guidelines is necessary because "after considering the evidence, the Court finds by the greater weight of the evidence that the application of the guidelines would not meet or would exceed the reasonable needs of the child considering the relative ability of each parent to provide support or would be otherwise unjust or inappropriate . . . . N.C. Gen. Stat. § 50-13.4 (c). In this instance, the trial court "must hear evidence and find facts related to the reasonable needs of the child for support and the parent's ability to pay[.]" *Biggs v. Greer*, 136 N.C. App. at 297, 524 S.E.2d at 581 ("However, upon a party's request that the trial court deviate from the Guidelines, G.S. § 50–13.4(c), or the court's decision on its own initiative to deviate from the presumptive amounts, the court must hear evidence and find facts related to the reasonable needs of the child for support and the parent's ability to pay, G.S. § 50–13.4(c)." (citation omitted)).

¶ 12 The North Carolina Child Support Guidelines define income as "a parent's actual gross income from any source, including but not limited to income from employment or self-employment (salaries, wages, commissions, *bonuses*, dividends, severance pay, etc.)[.]" N.C. Child Support Guidelines at 3 (emphasis added). For non-recurring income, "the court may average or prorate the income over a specified period of time or require an obligor to pay as child support a percentage of his or her non-recurring income *that is equivalent to the percentage of his or her recurring income paid for child support*." *Id.* (emphasis added).

> The court upon its own motion or upon motion of a party may deviate from the guidelines if, after hearing evidence and making findings regarding the reasonable needs of the child for support and the relative ability of each parent to provide support, it finds by the greater weight of the evidence that application of the guidelines would not meet, or would exceed, the reasonable needs of the child considering the relative

> ability of each parent to provide support, or would otherwise be unjust or inappropriate. *If the court deviates from the guidelines, the court must make written findings (1) stating the amount of the supporting parent's presumptive child support obligation determined pursuant to these guidelines, (2) determining the reasonable needs of the child and the relative ability of each parent to provide support, (3) supporting the court's conclusion that the presumptive amount of child support determined under the guidelines is inadequate or excessive or that application of the guidelines is otherwise unjust or inappropriate, and (4) stating the basis on which the court determined the amount of child support ordered.*

Id. (emphasis added).

¶ 13 The trial court found Father's "gross monthly income" was "$9,216" or $110,592.00 per year, but this amount was only his base income. Father regularly received substantial bonuses which sometimes exceeded his base income. Father's evidence showed his bonus in 2013 was $71,550.91; in 2014 it was $95,930.00; in 2015 it was $127,543.55; in 2016 it was $123,932.89, and in 2017 it was $190,000.00. Mother's gross monthly income from her job was $3,713.00. The trial court also found Mother's gross monthly income should be increased by $1,041.77 because "Mother lives with her mother and does not pay rent or utilities." This brings mother's total annual income to $57,057.24.

¶ 14 Here, the trial court used a hybrid of a Guideline child support calculation and a deviation from the Guidelines, while making only minimal findings as would be appropriate in a Guideline child support determination but not sufficient to allow appellate review of an order deviating from the Guidelines. Specifically, the trial court applied the Guidelines to Father's base income only, excluding his bonuses from the gross income calculation and calculating Guideline support using only his base income, and then deviated from the Guidelines only as to Father's income from his bonuses. While the trial court found that Father's yearly bonus was non-recurring income, bonuses are included in the definition of income:

> First, we note that the plain language of the Guidelines clearly includes bonus income in the definition of "income." Should certain bonus or other

> income be deemed irregular or nonrecurring, *the Guidelines further instruct the trial court to average or pro-rate the income or order the obligor to pay a percentage of his or her non-recurring income equivalent to the percentage of his or her recurring income for child support. There is no provision in the Guidelines that instructs the trial court to completely separate irregular or non-recurring bonus income from its calculations*. Second, we can infer that the trial court found that the bonus income was not irregular or non-recurring given that the order specifically stated each party had received and could expect an annual bonus. After reviewing the record, we agree that the bonus income did not constitute irregular or non-recurring income as contemplated by the Guidelines. *Finally, there is no provision in the Guidelines which instructs the trial court that it may elect to opt out of including bonus income in its calculations based solely on the premise that the reasonable needs and expenses of the children are otherwise satisfied without its inclusion*. Because the Guidelines include bonus income in the definition of income, and because the bonus income was not irregular or nonrecurring, the trial court was required to include the bonus income in calculating the parties' base income and the overall child support award. Its failure to do so constituted an abuse of discretion.

Hinshaw v. Kuntz, 234 N.C. App. 502, 506-07, 760 S.E.2d 296, 300 (2014).

¶ 15 The first step of the four-step process was to "determine the presumptive child support amount under the Guidelines." *Spicer*, 168 N.C. App. at 292, 607 S.E.2d at 685. The trial court made some findings relevant to this first step but did not complete the first step. To complete the first step, the trial court must first make findings of Father's gross income as defined by the Guidelines. Since Father's bonus income varied over the years, the trial court may consider an average based upon Father's income history or it may determine the entire gross income, including bonus income, in some other manner, but the findings of fact must address this issue. There is evidence in the record to support this type of finding, but only the trial court may make that determination. *See Hinshaw v. Kuntz*, 234 N.C. App. at 506-07, 760 S.E.2d at 300. Once the trial court has determined Father's and Mother's gross incomes, it must

calculate "the presumptive child support amount under the Guidelines." *Spicer*, 168 N.C. App. at 292, 607 S.E.2d at 685. Since the trial court's finding as to Father's gross income did not include his bonuses, the trial court could not calculate "the "presumptive child support amount under the Guidelines," *id.*, and we cannot review the trial court's determination to deviate from the Guidelines.

¶ 16 As to the second step, the trial court did "hear evidence as to the reasonable needs of the child for support and the relative ability of each parent to provide support." *Id.* But the trial court did not make sufficient findings regarding the reasonable needs of the child for support for this Court to be able to review this portion of the order. The findings state only that "[t]he listed expenses for the children are reasonable." Although both parties presented evidence regarding the children's expenses and which expenses they paid, the trial court did not explain which expenses it considered as reasonable or make any findings as to which party paid which expenses. In addition, the parties' expenditures for the "agreed-upon extracurricular activities" for the children was a major factual issue but the order fails to resolve this issue. The parties clearly did not agree on all of the "agreed-upon" expenses.[2]

¶ 17 As to the third and fourth steps, the trial court determined the presumptive support amount "would exceed the reasonable needs of the child considering the relative ability of each parent to provide support or would be otherwise unjust or inappropriate." *Id.* But the trial court did not make the findings required by the fourth step:

> Fourth, following its determination that deviation is warranted, in order to allow effective appellate review, the trial court must enter written findings of fact showing the presumptive child support amount under the Guidelines; the reasonable needs of the child; the relative ability of each party to provide support; and that application of the Guidelines would

2. The issues regarding custody and appointment of a parenting coordinator are not presented on appeal, but some of these issues are related to child support. Part of the dispute regarding custody and the need for a parenting coordinator was based upon the parties' pattern of disagreements as to which sports and other activities the children should participate in and which parent should bear the cost of these expenses. Mother contended that based on the substantial income disparity between the parents, Father should not be allowed to have the children participate in certain events and then seek reimbursement from her. In addition, the parties agreed at times to certain activities, such as golf, and then later disagreed as to payment for particular golf-related events. Both children were involved in a wide variety of sports and other extracurricular activities.

> exceed or would not meet the reasonable needs of the child or would be otherwise unjust or inappropriate.

Id. Without adequate findings as to the reasonable needs of the children or the presumptive child support as calculated based on the correct gross income of Father, we cannot discern why the trial court deviated from the Guidelines. We also note that Guideline child support normally does not take into account the vast array of extracurricular expenses involved in this case, which included soccer, baseball, golf, Boy Scouts, lacrosse, skiing, etiquette classes, tennis, and various summer camps. These types of expenses can also be considered as "extraordinary expenses" under the child support Guidelines. *See Biggs*, 136 N.C. App. at 298, 524 S.E.2d at 581-82 (" '[D]etermination of what constitutes an extraordinary expense is . . . within the discretion of the trial court[.]' Based upon the Guideline language above, 'the court may, in its discretion, make adjustments [in the Guideline amounts] for extraordinary expenses.' However, incorporation of such adjustments into a child support award does *not* constitute deviation from the Guidelines, but rather is deemed a discretionary adjustment to the presumptive amounts set forth in the Guidelines. In short, absent a party's request for deviation, the trial court is not required to set forth findings of fact related to the child's needs and the non-custodial parent's ability to pay extraordinary expenses." (first, second, and fourth alterations in original) (citations omitted)). However, in this case, the trial court did not treat the extra-curricular expenses as "extraordinary expenses" for purposes of calculating Guideline child support under the first step of the analysis for deviation from the Guidelines, nor did the trial court consider the extraordinary expenses as part of the "reasonable needs" of the children based upon North Carolina General Statute § 50-13.4(c). Whether child support is calculated based upon the reasonable needs of the children and ability of the parties to provide support or upon the Guidelines, these expenses should be addressed by the trial court.

¶ 18 The trial court is required to make detailed "findings of fact as to the criteria that justify varying from the guidelines and the basis for the amount ordered." N.C. Gen. Stat § 50-13.4(c); *see Beamer v. Beamer*, 169 N.C. App. 594, 599, 610 S.E.2d 220, 224 (2005) ("[O]ur Supreme Court has stressed that '[i]t is not enough that there may be evidence in the record sufficient to support findings which *could have been made*. The trial court must itself determine what pertinent facts are actually established by the evidence before it . . . .' Because the trial court failed to include the necessary findings of fact regarding the children's reasonable needs, this Court must reverse and remand for further proceedings. *See also* 2 Suzanne Reynolds, Lee's North Carolina Family Law § 10.15 (5th

ed. 1999) ('If the trial court fails to make findings regarding the child's reasonable needs, it cannot determine whether the application of the [G]uidelines would not meet the reasonable needs of the child, and deviation is improper.')." (second and third alterations in original) (citations omitted)). The trial court has discretion in making the child support calculation, but the trial court does not have the discretion to establish child support by a method other than that established by North Carolina General Statute § 50-13.4, and it must make findings sufficient to allow appellate review of the child support calculation. We must therefore reverse the 2019 Order and remand for additional proceedings.

C. Mother's Income

¶ 19 **[2]** Mother argues, "the trial court abused its discretion when it added $1,041.77 per Month to [Mother's] monthly income and then deviated from the North Car[o]lina Child Support Guidelines." Although we have already determined we must reverse the 2019 Order, we will also address Mother's argument regarding the trial court's findings regarding her income as the trial court must also make findings regarding Mother's income to calculate child support on remand.

¶ 20 Here, as to Mother's income and expense, the trial court found,

> 12. Mother lives with her mother and does not pay rent or utilities. Her gross monthly income should be increased by $1,041.77 because the payment of these expenses by her mother substantially reduces her living expenses.
>
> . . . .
>
> 26. Mother's income, her paying few living expenses, and her receiving monthly child support of $471.36 plus 2% of Father's bonus, allows her to meet her share of the needs of the children.

¶ 21 The North Carolina Child Support Guidelines include "maintenance received from persons other than the parties to the instant action" as income, and the value of housing falls within this definition. *Spicer*, 168 N.C. App. at 289, 607 S.E.2d at 683 ("We therefore hold that the trial court did not err in including the $300.00 per month value of Mr. Spicer's housing as income.").

¶ 22 The trial court did not err by treating housing and utilities provided by Mother's mother as part of Mother's income and increasing Mother's income by $1,041.77. But because the trial court failed to make sufficient

findings regarding Mother's expenses, we are unable to determine to what extent Mother's "few living expenses" resulted in the deviation from the child support Guidelines. Mother argues the trial court both added the housing and utilities provided by her mother to her income and then used her "reduced shared expenses (not paying rent and utilities) as a reason to deviate from the North Carolina Child Support Guidelines," resulting in a "double-dip" to Mother's detriment. Mother's argument is plausible, but the trial court's findings of fact are too minimal for us to determine if the trial court double-counted these numbers.[3] Since we are unable to determine whether the trial court counted the value of Mother's "living expenses" twice, and we are reversing based on insufficient findings for deviation, we reverse the entire child support calculation and remand for a new order.

D. Determination of Arrears

¶ 23 **[3]** Because we are reversing the child support order, we must also reverse the order as to the calculation of arrears. Since the trial court based the arrears determination upon the child support obligation, at least in part, the entire arrears amount must be recalculated. However, Mother also argues that the trial court failed to make sufficient findings to allow appellate review of the arrears calculation. Specifically, the 2013 Consent Order required Mother and Father to pay portions of uninsured medical expenses and agreed-upon extracurricular expenses. Father also paid Mother alimony until August 2016. Thus, the sums Father was obligated to pay to Mother included monthly child support; alimony; 60% of unreimbursed medical expenses; and 60% of "agreed-upon" extracurricular expenses. The period of time addressed by the motion regarding arrears covered from December 2013 to September 2018. In any month in which Father failed to pay the full amount of child support, alimony, or other reimbursement sums owed, he would owe Mother arrears for that month. In any month he overpaid his obligations, Mother would owe this overpayment back to Father. Father also contended Mother owed him for 40% of unreimbursed medical expenses he had paid and 40% of agreed-upon extracurricular expenses he had paid.[4] To the extent

3. Mother also challenged many of the trial court's findings of fact as unsupported by the evidence. We have not addressed each of these challenges since we have determined the findings did not address the factors as required by North Carolina General Statute § 50-13.4(c) and the Child Support Guidelines and are not sufficient to allow appellate review.

4. Mother and Father had substantial disputes regarding the children's extracurricular activities, so the trial court must also determine which expenses were actually "agreed upon" as extracurricular expenses covered by the 2013 Consent Order. If either party sought reimbursement for extracurricular expenses not covered by the 2013 Consent Order, those expenses should not be included in the arrears calculation.

Mother failed to reimburse Father for these expenses, she would owe him arrears. The trial court may offset these amounts owed, assuming Father underpaid his child support and other obligations and Mother also underpaid her obligations.

¶ 24 Mother presented voluminous financial evidence including detailed evidence of the amounts Father paid in each month in question and the expenditures for which each party sought reimbursement, but the trial court did not make findings as to these sums. Instead, the trial court found "[t]here is insufficient evidence to support Mother's claims. Based upon the competent evidence presented, any reduced payments to Mother for child support were reduced for Mother's share of expenses Father paid for the children. Father does not owe Mother any arrears." Father did not present evidence refuting the amounts of the payments Mother contended he had made but argues on appeal that Mother focuses on the "quantity of evidence she presented," but "the quality of evidence is what is important." We agree quality is more important than quantity, but without findings of fact addressing the factual issues raised, we cannot perform proper appellate review of the order.

¶ 25 Making matters more complicated, Father sometimes paid by bank transfer—the method dictated by the 2013 Consent Order—but sometimes paid by check or Venmo. According to Mother, she sometimes paid extracurricular expenses at Father's behest directly and sometimes Father reduced his payment to Mother. Father did not present evidence explaining the reduced payments of child support as listed by Mother but simply testified that "every deduction has always been for some expense for the children." He testified "it would take incredible forensics to go back in 2014 for the emails and bank accounts and everything else at this point so I'm a little caught off guard." Father argues that some of Mother's testimony and evidence regarding payments and expenses was "confusing and not complete."

¶ 26 The trial court's findings do not explain how the trial court calculated the precise number of $5,313.44 owed by Mother to Father. Although the trial court determines the credibility and weight of the evidence, here the findings are simply not adequate to allow appellate review of the issues presented and calculation of arrears. On remand, the trial court must make findings resolving the many factual disputes, including which extra-curricular expenses were "agreed upon" and thus covered by the 2013 Consent Order, and make findings adequate for appellate review of the order as to any arrears owed by either party.

III. Conclusion

¶ 27 For the foregoing reasons, the trial court's order is reversed and remanded for entry of a new order which complies with North Carolina General Statute § 50-13.4. If either party requests additional hearing after remand, the trial court shall receive additional evidence prior to entry of a new order. If neither party requests additional hearing, the trial court may enter a new order based solely upon the existing record.

REVERSED AND REMANDED.

Judges MURPHY and COLLINS concur.

RICHARD P. MEABON, PLAINTIFF
v.
MICHAEL K. ELLIOTT; ELLIOTT LAW FIRM, P.C., DEFENDANTS

No. COA20-559

Filed 15 June 2021

Civil Procedure—Rule 41 dismissal—failure to prosecute—four-year delay in service of summons and complaint—deliberate or unreasonable delay

The trial court properly dismissed plaintiff's legal malpractice claim pursuant to Civil Procedure Rule 41—for failure to prosecute—based on plaintiff's four-year delay in serving defendants with the summons and complaint, during which time one of the defendant attorneys died and a legal assistant moved to another state. Although plaintiff argued he had been waiting for the resolution of a related federal bankruptcy matter, he still waited over eighteen months after the end of that case, and only after being directed by the trial court, to serve defendants. Therefore, evidence supported the trial court's findings that the delay was deliberate or unreasonable, that defendants were prejudiced by the delay, and that lesser sanctions than dismissal were not adequate.

Appeal by plaintiff from order entered 19 December 2019 by Judge Hugh B. Lewis in Mecklenburg County Superior Court. Heard in the Court of Appeals 25 May 2021.

Hausler Law Firm, PLLC, by Kurt F. Hausler, for plaintiff-appellant.

Womble Bond Dickinson (US) LLP, by Kimberly Sullivan and M. Elizabeth O'Neill, for defendants-appellees.

TYSON, Judge.

¶ 1 Richard P. Meabon ("Plaintiff") appeals from an order entered 19 December 2019. We affirm.

I. Background

¶ 2 Plaintiff petitioned for bankruptcy protection under Chapter 7 of the U.S. Bankruptcy Code on 23 February 2010. Plaintiff was represented by G. Martin Hunter. Prior to his representation by attorney Hunter, Plaintiff had consulted with attorney Rick Mitchell. Plaintiff ultimately decided not to hire attorney Mitchell after being told he would have to disclose a trust account ("1985 Trust") in his bankruptcy schedules. The 1985 Trust, created by Plaintiff's father, had an approximate value of $425,000 at the time of Plaintiff's bankruptcy petition. Plaintiff did not disclose the 1985 Trust account to attorney Hunter. Attorney Hunter filed the Chapter 7 petition and schedules on behalf of Plaintiff without disclosing the trust on the schedules.

¶ 3 Soon thereafter, attorney Mitchell informed attorney Hunter of the existence of the 1985 Trust. Attorney Hunter immediately demanded of Plaintiff to amend the schedules and disclose the 1985 Trust to the bankruptcy court, which Plaintiff eventually did. Plaintiff terminated representation by attorney Hunter as his counsel.

¶ 4 Plaintiff then retained Defendants as counsel in August 2011. On 20 September 2011, the bankruptcy trustee filed an Adversary Proceeding to determine ownership of the 1985 Trust. On 12 January 2012, the bankruptcy court determined the assets of the 1985 Trust were property of the bankruptcy estate.

¶ 5 Martha Medlin, Plaintiff's sister, transferred the money in the 1985 Trust account to Plaintiff's father on 1 March 2012. On 24 April 2012, Defendants notified the bankruptcy trustee of the funds removal and sent the bankruptcy trustee a check for the remaining balance in the account for $1,700.00. On 3 May 2012, an emergency hearing was scheduled by the bankruptcy trustee regarding Medlin's removal of the 1985 Trust money. On 15 May 2012, another Adversary Proceeding was filed to recover the funds moved out of the 1985 Trust.

¶ 6 On 24 September 2012, the bankruptcy trustee filed an Adversary Proceeding to revoke Plaintiff's bankruptcy discharge pursuant to

11 U.S.C. § 727(d)(1), which states the court shall revoke a discharge "if such discharge was obtained through the fraud of the debtor, and the requesting party did not know of such fraud until after the granting of such discharge." 11 U.S.C. § 727(d)(1).

¶ 7 The bankruptcy court found Plaintiff had also failed to schedule and hidden the existence of another trust account ("1991 Trust"). On 8 April 2014, the bankruptcy court entered an order revoking Plaintiff's discharge for failing to schedule and attach the 1985 Trust.

¶ 8 Criminal contempt charges were filed against Plaintiff. Plaintiff pled guilty to contempt of court for failing to disclose the 1985 Trust. Plaintiff served a sixty-day prison sentence. The revocation of Plaintiff's discharge was upheld by the United States District Court for the Western District of North Carolina on 6 June 2016, and by the United States Court of Appeals for the Fourth Circuit on 28 September 2017.

¶ 9 Plaintiff commenced this action on 20 January 2015, alleging legal malpractice against Defendants in their representation of the aforementioned proceedings. Plaintiff asserted Defendants' malpractice caused Plaintiff's discharge to be revoked and caused him to be held criminally liable for contempt. Plaintiff filed an order extending time to file a complaint, and a civil summons to be served with the order extending time to file complaint was issued. On 9 February 2015, Plaintiff filed his complaint and was issued a delayed service of complaint. Plaintiff did not serve the summons and complaint on Defendants at that time. Plaintiff filed an alias and pluries summons on 20 April 2015, and continued to file alias and pluries summonses approximately every ninety days, until 8 February 2019.

¶ 10 On 14 March 2019, the trial court entered an Order Directing Action in Case instructing Plaintiff to serve Defendants or the case would be eligible for administrative dismissal on 15 April 2019. On 8 April 2019, Plaintiff served Defendants.

¶ 11 Between 20 April 2015 and 8 February 2019, Plaintiff did not attempt to serve Defendants, who maintained the same law office and address throughout those four years. Attorney Hunter died in June 2017. During the four-year delay, Defendants had changed computer and software systems, losing certain time entries, documents, and conference room reservation information, which may have pertained to the case. Mindy Holt, Defendants' legal assistant, had worked with attorney Hunter on Plaintiff's bankruptcy case, and later for Defendants. She had left their employment and moved to Missouri.

¶ 12 On 6 November 2019, Defendants filed a motion to dismiss for the failure to prosecute under Rule 41(b). The trial court heard the motion on 19 December 2019. The trial court found Plaintiff's excuse of being "gutted" and "devastated" after the Fourth Circuit's opinion was not good cause justifying his eighteen-to-twenty-month delay in serving Defendants.

¶ 13 The trial court concluded the Plaintiff had acted in a manner that deliberately and unreasonably delayed the matter, preventing the preservation of evidence that could assist a jury in determining if malpractice had occurred. The trial court determined dismissal with prejudice was the only appropriate sanction and dismissed Plaintiff's complaint. Plaintiff appeals.

II. Jurisdiction

¶ 14 This Court has jurisdiction over a final judgment regarding a motion to dismiss for failure to prosecute pursuant to N.C. Gen. Stat. § 7A-27(b)(1) (2019).

III. Issue

¶ 15 Plaintiff argues the trial court erred in granting Defendants' motion to dismiss for failure to prosecute under N.C. Gen. Stat. § 1A-1, Rule 41(b) (2019).

IV. Standard of Review

¶ 16 "The standard of review for a Rule 41(b) dismissal is (1) whether the findings of fact by the trial court are supported by competent evidence, and (2) whether the findings of fact support the trial court's conclusions of law and its judgment." *Cohen v. McLawhorn*, 208 N.C. App. 492, 498, 704 S.E.2d 519, 524 (2010) (citation and internal quotation marks omitted). "Unchallenged findings of fact are presumed to be supported by competent evidence, and are binding on appeal." *Id.* (citations and internal quotation marks omitted). If competent evidence supports the findings, they are binding upon appeal. *Starco, Inc. v. AMG Bonding & Ins. Servs.*, 124 N.C. App. 332, 335, 477 S.E.2d 211, 214 (1996).

¶ 17 "[I]n reviewing the appropriateness of the particular sanction imposed, an abuse of discretion standard is proper because the rule's provision that the court shall impose sanctions for motions abuses concentrates the court's discretion on the *selection* of an appropriate sanction rather than on the *decision* to impose sanctions." *Egelhof v. Szulik*, 193 N.C. App. 612, 619, 668 S.E.2d 367, 372 (2008) (*quoting Turner v. Duke Univ.*, 325 N.C. 152, 165, 381 S.E.2d 706, 714 (1989)). The trial

court's "conclusions of law are reviewable *de novo* on appeal." *Starco*, 124 N.C. App. at 336, 477 S.E.2d at 215.

V. Analysis

¶ 18 Plaintiff argues the trial court erred in granting Defendants' motion to dismiss for failure to prosecute pursuant to N.C. Gen. Stat. § 1A-1, Rule 41(b). Rule 41(b) provides, in relevant part, "For failure of the plaintiff to prosecute or to comply with these rules or any order of court, a defendant may move for dismissal of an action or of any claim therein against him." N.C. Gen. Stat. § 1A-1, Rule 41(b).

¶ 19 Prior to dismissing a claim for failure to prosecute, the trial court is to determine three factors: "(1) whether the plaintiff acted in a manner which deliberately or unreasonably delayed the matter; (2) the amount of prejudice, if any, to the defendant; and, (3) the reason, if one exists, that sanctions short of dismissal would not suffice." *Wilder v. Wilder*, 146 N.C. App. 574, 578, 553 S.E.2d 425, 428 (2001). The trial court considered all three factors prior to dismissing Plaintiff's complaint. Plaintiff argues he did not deliberately delay the matter, Defendants would not be prejudiced, and the judge should have considered lesser sanctions other than dismissal. We disagree and address each factor below.

A. Deliberate or Unreasonable Delay

¶ 20 Plaintiff argues he neither deliberately nor unreasonably delayed the matter by failing to serve the complaint to Defendants for over four years. N.C. Gen. Stat. § 1A-1, Rule 4(a) states, "The complaint and summons shall be delivered to some proper person for service." N.C. Gen. Stat. § 1A-1, Rule 4(a) (2019).

¶ 21 Plaintiff repeatedly extended the time allowed for service by serving alias and pluries summons every ninety days until they could serve Defendants. *See* N.C. Gen. Stat. § 1A-1, Rule 4(d) (2019). This Court has recognized alias and pluries summons are an appropriate tool for extending the time for service, yet also determined delays of service for less than a year have been deliberate and unreasonable. *See Smith v. Quinn*, 324 N.C. 316, 319, 378 S.E.2d 28, 30 (1989).

¶ 22 In *Smith v. Quinn*, our Supreme Court determined an eight-month delay by use of alias and pluries summons was a violation of the spirit of the rules of civil procedure for the purpose of delay or obtaining an unfair advantage. *Id.* In *Smith*, the plaintiff filed a complaint for an alleged injury from a fall on defendant's property. *Id.* at 317, 378 S.E.2d at 29. She used alias and pluries summons to delay service for eight months. *Id.*

¶ 23 The Court reasoned the failure to serve the defendant for eight months prevented defendant from critical knowledge of the alleged incident. The alleged event had then occurred three years prior. *Id.* at 319, 378 S.E.2d at 30. The Court held dismissal "pursuant to Rule 41(b) based upon plaintiff's violation of Rule 4(a) for the purposes of delay and in order to gain an unfair advantage over the defendant" was appropriate. *Id.* at 319, 378 S.E.2d at 31.

¶ 24 Plaintiff delayed service for over four years, well beyond the delays allowed by our Supreme Court. The four-year delay, as in *Smith*, prevented Defendants' knowledge of the suit, they were not on notice to preserve evidence and prepare for the action. Knowledge, personnel, and records of the events faded and were lost over the four years. The attorney representing Plaintiff had died and a staff assistant of the firm had moved out of state. In addition, Plaintiff eventually served Defendants only after receiving an Order Directing Action in Case from the trial court.

¶ 25 Where the Rules of Civil Procedure are violated for the purpose of delay or gaining an unfair advantage, dismissal of the action is an appropriate remedy. *See Stocum v. Oakley*, 185 N.C. App. 56, 65, 648 S.E.2d 227, 234 (2007) (citation omitted). Plaintiff argues he did not delay to gain unfair advantage. He offers no showing or support to the contrary. The trial court's findings of fact are supported by competent evidence.

¶ 26 Plaintiff argues he did not deliberately or unreasonably delay the matter because he was attempting to mitigate his damages, while awaiting the decision on his Rule 60 motion from the United States Court of Appeals for the Fourth Circuit.

¶ 27 Our Court has held:

> Although the general rule in North Carolina is that attorneys' fees and other costs associated with litigation are not recoverable in a legal malpractice action absent statutory liability, this rule does not apply to bar recovery for costs, including attorneys' fees, incurred by a plaintiff to remedy the injury caused by the malpractice.

Gram v. Davis, 128 N.C. App. 484, 489, 495 S.E.2d 384, 387 (1998).

¶ 28 Plaintiff argues he waited to serve the complaint until he was sure of the total amount of his damages from the alleged malpractice. The Fourth Circuit upheld the federal district court's denial of Plaintiff's appeal of his Rule 60 motion on 28 September 2017. Plaintiff filed

on 9 February 2015, but did not serve the complaint on Defendants until 9 April 2019. At hearing, the court asked Plaintiff why he had waited eighteen to twenty months to file the complaint after receiving the opinion from the Fourth Circuit. Plaintiff replied that he was "gutted" and "devasted" by that decision.

¶ 29 Our Court has consistently dismissed similar cases for delays of significantly shorter length than Plaintiff's delay of four years. *Sellers v. High Point Mem'l Hosp., Inc.*, 97 N.C. App. 299, 388 S.E.2d 197 (1990) (dismissal with prejudice for six-month delay in service of summons was the appropriate sanction); *Melton v. Stamm*, 138 N.C. App. 314, 530 S.E.2d 622 (2000) (dismissal with prejudice for failure to serve defendant after serving alias and pluries summons for fourteen months before service). Plaintiff's delay in service of the complaint is unreasonable, if not also deliberate. The trial court's conclusions are supported by findings that are based upon competent evidence. *Cohen*, 208 N.C. App. at 498, 704 S.E.2d at 524.

B. Prejudice to Defendant

¶ 30 Plaintiff argues the court's conclusion of law that Defendants would be prejudiced by having to participate in the suit is unsupported. Plaintiff contends no evidence tends to show attorney Hunter or Holt would have any information that is needed in the suit. "If witnesses die or disappear during a delay, the prejudice is obvious." *Barker v. Wingo*, 407 U.S. 514, 532, 33 L. Ed. 2d 101, 118 (1972).

¶ 31 The trial court found the delay prejudiced Defendants because, attorney Hunter had died and Holt had moved to Missouri. Had Plaintiff served Defendants within a reasonable amount of time, records would have been accessible and preserved, and attorney Hunter, Plaintiff's former attorney in the bankruptcy matter, may have been able to testify about the representation and proceedings. Plaintiff's inordinate delays increased Defendants' costs and ability to preserve and present their defense to Plaintiff's claims. The trial court correctly concluded Plaintiff's inordinate delays in service prejudiced Defendants.

C. Dismissal the Appropriate Sanction

¶ 32 Plaintiff argues the trial court's conclusion of law stating nothing short of dismissal with prejudice will suffice, is not supported by reason. Plaintiff does not offer any showing or support tending to show a lesser sanction would be appropriate under these circumstances.

¶ 33 "The trial court in its discretion found that no lesser sanction would better serve the interests of justice in this case. We find no basis

for concluding that the trial court abused its discretion." *Sellers*, 97 N.C. App. at 303, 388 S.E.2d at 199 (dismissal under Rule 41(b) appropriate for six-month delay in service, where the delay was deliberate and unreasonable).

¶ 34 The trial court's choice of sanction was proper and certainly not an abuse of discretion. *Id.* A four-year delay in service, found to be deliberate and unreasonable, coupled with the death of attorney Hunter and moving of Holt out of state, prejudiced Defendants. *Barker*, 407 U.S. at 532, 33 L. Ed. 2d at 118.

VI. Conclusion

¶ 35 The trial court correctly considered the *Wilder* factors and determined Plaintiff deliberately and unreasonably delayed service of process, and the delay had prejudiced Defendants. The trial court did not err and certainly did not abuse its discretion in granting Defendants' motion to dismiss for failure to prosecute under Rule 41(b). Dismissal was the most appropriate sanction. *Id.* The trial court's order is affirmed. *It is so ordered.*

AFFIRMED.

Judges MURPHY and JACKSON concur.

STATE OF NORTH CAROLINA
v.
AMY REGINA ATWELL

No. COA20-496

Filed 15 June 2021

1. Indictment and Information—facial validity—purchasing a firearm while subject to a domestic violence protective order—elements

The indictment charging defendant with purchasing a firearm while subject to a domestic violence protective order (DVPO), as defined in N.C.G.S. § 14-409.39(2), was facially valid where it specifically referenced defendant's attempt to purchase a firearm, the existence of a DVPO against her, and the fact that the DVPO was in effect at the time defendant attempted the firearm purchase.

2. Constitutional Law—right to appointed counsel—forfeiture—colloquy required by N.C.G.S. § 15A-1242

The trial court in a criminal prosecution properly concluded that defendant had forfeited her right to appointed counsel, where defendant would repeatedly fire her court appointed attorneys (often within days of their appointment), then waive her right to appointed counsel, and then withdraw those waivers while requesting either new appointed counsel or additional time to acquire enough funds to hire an attorney. Moreover, the court properly required defendant to proceed to trial without assistance of counsel after informing her—as required by N.C.G.S. § 15A-1242—of her right to counsel, the consequences of proceeding pro se, the nature of the charges and proceedings, and the range of permissible punishments.

Judge JACKSON concurring in part and dissenting in part.

Appeal by defendant from judgment entered on 29 January 2020 by Judge Jeffery K. Carpenter in Union County Superior Court. Heard in the Court of Appeals 13 April 2021.

Attorney General Joshua H. Stein, by Special Deputy Attorney General David D. Lennon, for the State.

W. Michael Spivey for the Defendant.

ARROWOOD, Judge.

¶ 1 Amy Regina Atwell ("defendant") appeals from judgment entered upon a jury verdict finding her guilty of attempting to purchase a firearm while subject to a domestic violence protective order ("DVPO") prohibiting the same, a violation of N.C. Gen. Stat. § 14-269.8. Defendant contends that the indictment charging her with this crime was fatally defective and that the trial court erred in concluding that she had forfeited her right to counsel. For the following reasons, we affirm the trial court.

I. Background

¶ 2 On 9 August 2013, Judge Hunt Gwyn entered an *ex parte* DVPO against defendant in Union County District Court. The order required that defendant "surrender to the Sheriff . . . [any] firearms, ammunition, and gun permits . . . in [her] . . . ownership or control." The order further provided that failing to surrender her firearms or "possessing, purchasing, or receiving a firearm, ammunition or permits to purchase or carry

concealed firearms . . . is a crime." The order also stated in a portion captioned, "Notice to Parties," as follows:

> TO THE DEFENDANT:
>
> 1. If this Order prohibits you from possessing, receiving or purchasing a firearm and you violate or attempt to violate that provision, you may be charged with a Class H felony pursuant to North Carolina G.S. 14-269.8 and may be imprisoned for up to 30 months.
>
> 2. If you have been ordered to surrender firearms, ammunition, and gun permits and you fail to surrender them as required by this Order, or if you failed to disclose to the Court all information requested about possession of these items or provide false information about any of these items you may be charged with a Class H felony and may be imprisoned for up to 30 months.

¶ 3 The DVPO was renewed annually and was in effect on 9 August 2017 when defendant unsuccessfully attempted to purchase a .22 caliber rifle at the Tennessee Kentucky Pawn in Scott County, Tennessee. A warrant was issued for her arrest on 10 August 2017. On 5 February 2018, defendant was indicted by a Union County grand jury with attempting to purchase a firearm while subject to a DVPO prohibiting the same.

¶ 4 The case was continued twice and came on for hearing on 18 September 2019 in Union County Superior Court, the Honorable William A. Wood presiding. At the 18 September 2019 hearing, defendant appeared without representation after her fifth attorney had withdrawn. Defendant's case had been continued to allow time for defendant to hire an attorney. When the trial court asked defendant what she was "going to do about a lawyer[,]" defendant explained that she could not afford a lawyer and wanted another court appointed attorney. Judge Wood responded:

> THE COURT: Well, quite frankly I've never seen a file like this as far as your attorney situation goes. This all started back in August 19, 2017, which is the date of offense in these charges. And it looks like you got indicted in February of 2018, a year and a half ago, and were appointed an attorney who you promptly fired on February 12th, 2018. Then you waived your right to a court appointed lawyer. I believe you signed

> another waiver of your right to a court appointed lawyer. Those were on April 17th, 2018 and May 15th, 2018. You were given a continuance on June the 12th at your own request and then you were appointed another attorney on September the 11th, 2018 who withdrew from your case, it doesn't really say why in the file. You filed another waiver on October 11th, 2018. You were appointed another attorney on December the 13th, 2018 who you promptly fired in June of 2019. And then you signed another waiver and asked for a continuance to hire your own lawyer. Don't you think it's gone on long enough?

¶ 5 Defendant reiterated that she could not afford a lawyer on the date of the hearing and had asked for a continuance due to her disability and low income. When Judge Wood asked why defendant had fired her prior attorneys, defendant explained that one had withdrawn due to a conflict of interest, and "two other attorneys were totally going in two different ways of defense[,]" such that defendant did not feel that the attorneys represented her interests.

¶ 6 The trial court next asked the State "what's your pleasure with this case[?]" The State responded that they were "ready to move forward with the case at this point[,]" that the case "just needs to be arraigned and we'll move it to a trial calendar[,]" while defendant could "still possibly retain[ ] counsel if she chooses to do so."

¶ 7 The following colloquy then transpired:

> THE COURT: Well, what I'm going to do is I'm going to put an order in the file basically saying you waived your right to have an attorney. If you would like to hire your own attorney, that will be fine, but based on these – the history of this file, it appears to me that your process in moving this case along has been nothing more than to see how long you can delay it until it goes away. The way you've behaved appears to be nothing more than a delay tactic and that's what I'm going to put an order in the file and I'm going to make specific findings as to everything I just told you and to some other things that are in the file. I'm going to let the prosecutor arraign you and set this case for trial. Do you understand that?

THE DEFENDANT: Yes.

THE COURT: Now, that doesn't preclude you from hiring your own attorney. You can hire your own attorney but you're going to have to do that and have your attorney ready by the time the prosecutor has this case on the trial calendar. Additionally, if you don't hire an attorney, you're going to be responsible for representing yourself. Do you know what that means?

THE DEFENDANT: Representing myself.

THE COURT: Yes.

THE DEFENDANT: It means representing myself.

THE COURT: It does. It means you're going to have to negotiate any plea deal if there is one with the prosecutor. You're going to have to handle all the Discovery in this case. If there is a jury trial you're going to have to select a jury and keep up with any motions and try the case just as if you were an attorney and be held to the same standard as an attorney. You're not going to get legal advice from me or whoever the judge is. Do you understand that?

THE DEFENDANT: No, because I've already requested a jury trial.

THE COURT: Well what is it about that that you don't understand?

THE DEFENDANT: You said if I get a jury trial.

THE COURT: You're welcome – I mean, nobody's going to make you plead guilty. You can have a jury trial.

THE DEFENDANT: Thank you.

THE COURT: There's other ways for a case to go away. Do you understand that?

THE DEFENDANT: Okay.

THE COURT: I don't know what's ultimately going to have happen to this case but you are entitled to a jury

> trial most definitely. What I want you to understand is that if you represent yourself, you're going to be held to the same standards of an attorney. Do you understand that?
>
> THE DEFENDANT: You're giving me no choice. I mean, I asked for another court appointed attorney and you said no, so –
>
> THE COURT: You've had choice after choice after choice. You've been given a court appointed attorney on three[1] occasions, which is two more than you usually get.
>
> THE DEFENDANT: I've got the e-mails from one of the lawyers that was actually giving me wrong court dates to be in court.
>
> THE COURT: Well, one of the attorneys there is no indication as to why that attorney withdrew, the other took – you took them off the case, basically. So do you understand what's going on here, ma'am?
>
> THE DEFENDANT: You've denied me a court appointed attorney. Yes, I understand that.
>
> THE COURT: I've denied you a fourth court appointed attorney.
>
> THE DEFENDANT: I understand that, yes.

Judge Wood concluded in a 20 September 2019 order that defendant had forfeited her right to counsel.

¶ 8 The case came on for trial before the Honorable Jeffrey K. Carpenter on 13 January 2020. Defendant was present during the first two days of trial, but on the second day, disappeared. On 14 January 2020, the court recessed for lunch at 12:16 p.m. and reconvened at 2:01 p.m. but defendant never returned from the lunch break. The court then recessed for the day and issued an order for defendant's arrest.

¶ 9 The following morning, defendant did not appear, and the trial court decided to proceed in her absence. Due to Judge Wood's conclusion that defendant had forfeited her right to counsel, neither defendant nor her

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1. As Judge Wood's 20 September 2019 order reflects, the correct number at that point was five.

counsel were present for the remainder of the trial, which took place over the course of the third day. At the conclusion of the trial, the jury found defendant guilty.

¶ 10 Defendant was located about two weeks later. On 28 January 2020, the trial court sentenced her to a term of 5 to 15 months in prison. Defendant gave notice of appeal in open court.

II. Discussion

¶ 11 Defendant contends that the indictment charging her with this crime was fatally defective and that the trial court erred in concluding that she had forfeited her right to counsel. We disagree.

A. Validity of Indictment

¶ 12 **[1]** "[A] valid bill of indictment is essential to the jurisdiction of the trial court to try an accused for a felony." *State v. Campbell*, 368 N.C. 83, 86, 772 S.E.2d 440, 443 (2015) (quoting *State v. Sturdivan*t, 304 N.C. 293, 308, 283 S.E.2d 719, 729 (1981)). A valid indictment, among other things, serves to "identify the offense" being charged with certainty, to "enable the accused to prepare for trial," and to "enable the court, upon conviction, to pronounce the sentence." *State v. Rankin*, 371 N.C. 885, 886, 821 S.E.2d 787, 790 (2018) (citing *State v. Saults*, 294 N.C. 722, 726, 242 S.E.2d 801, 805 (1978)).

¶ 13 A sufficient indictment must include "[a] plain and concise factual statement" asserting "facts supporting every element of a criminal offense and the defendant's commission thereof." N.C. Gen. Stat. § 15A-924(a)(5) (2019). If the indictment fails to state an essential element of the offense, any resulting conviction must be vacated. *See, e.g.*, *Campbell*, 368 N.C. at 86, 772 S.E.2d at 443; *see also State v. Wagner*, 356 N.C. 599, 601, 572 S.E.2d 777, 779 (2002) (per curiam). The law disfavors application of rigid and technical rules to indictments; so long as an indictment adequately expresses the charge against the defendant, it will not be quashed. *See State v. Sturdivant*, 304 N.C. 293, 311, 283 S.E.2d 719, 731 (1981).

¶ 14 In *State v. Mostafavi*, the defendant argued that the indictment charging him with obtaining property by false pretenses omitted an essential element of the crime because it failed to allege the precise amount of money the defendant received when he pawned the property obtained. 370 N.C. 681, 683, 811 S.E.2d 138, 140 (2018). Our Supreme Court held that the indictment was facially valid because it clearly identified "the conduct which [was] the subject of the accusation" by alleging that the defendant received United States currency by pawning stolen

property as if it were his own. *Id.* at 687, 811 S.E.2d at 142 (quoting N.C. Gen. Stat. § 15A-924(a)(5)).

¶ 15 Here, the indictment charged that defendant "willfully and feloniously did attempt to purchase a firearm, as defined in [N.C. Gen. Stat. §] 14-409.39(2), knowing that a protective order was entered against her, pursuant to Chapter 50B of the General Statutes and was in effect at the time she attempted to purchase the firearm." The indictment specifically references the attempt to purchase a firearm, the existence of a protective order against defendant, and that the order "was in effect at the time she attempted to purchase the firearm." The indictment adequately expressed the charge against defendant within a reasonable certainty to enable defendant to prepare for trial and for the court to pronounce the sentence. Accordingly, we hold that the indictment was valid.

B. Forfeiture of Right to Counsel

¶ 16 **[2]** "A criminal defendant's right to representation by counsel in serious criminal matters is guaranteed by the Sixth Amendment to the United States Constitution and Article I, §§ 19, 23 of the North Carolina Constitution." *State v. Blakeney*, 245 N.C. App. 452, 459, 782 S.E.2d 88, 93 (2016) (citations omitted). "This includes the right of indigent defendants to be represented by appointed counsel." *State v. Harvin*, 268 N.C. App. 572, 590, 836 S.E.2d 899, 909 (2019) (citation omitted).

¶ 17 There are several circumstances where an indigent defendant may lose the right to appointed counsel. *State v. Curlee*, 251 N.C. App. 249, 252, 795 S.E.2d 266, 269 (2016) (citation omitted). The first is waiver of the right to counsel, which must be made knowingly, intelligently, and voluntarily. *Id.* at 253, 795 S.E.2d at 269 (citation omitted). Once given, "a waiver of counsel is good and sufficient until the proceedings are terminated or until the defendant makes known to the court" that they desire to withdraw the waiver and have counsel appointed. *Id.* (citation omitted). The burden of establishing a change of desire for the assistance of counsel rests upon the defendant. *Id.* (citation omitted).

¶ 18 Additionally, a defendant may forfeit the right to counsel "in situations evincing egregious misconduct by a defendant[.]" *State v. Simpkins*, 373 N.C. 530, 535, 838 S.E.2d 439, 446 (2020). This conduct must be "egregious dilatory or abusive conduct on the part of the defendant which undermines the purposes of the right to counsel." *Id.* at 541, 838 S.E.2d at 449. "There is no bright-line definition of the degree of misconduct that would justify forfeiture of a defendant's right to counsel[,]" but forfeiture has been found in cases where the defendant engaged in

> (1) flagrant or extended delaying tactics, such as repeatedly firing a series of attorneys; (2) offensive or abusive behavior, such as threatening counsel, cursing, spitting, or disrupting proceedings in court; or (3) refusal to acknowledge the trial court's jurisdiction or participate in the judicial process, or insistence on nonsensical and nonexistent legal "rights."

Blakeney, 245 N.C. App. at 461-62, 782 S.E.2d at 94 (referencing several published cases concerning forfeiture of the right to counsel).

¶ 19 In *Simpkins*, our Supreme Court discussed various categories of conduct sufficient to constitute forfeiture, including where "the defendant is attempting to obstruct the proceedings and prevent them from coming to completion." *Simpkins*, 373 N.C. at 538, 838 S.E.2d at 447. Regarding obstruction, the Court included examples such as a defendant who "refuses to obtain counsel after multiple opportunities to do so, refuses to say whether he or she wishes to proceed with counsel, refuses to participate in the proceedings, or continually hires and fires counsel and significantly delays the proceedings[.]" *Id.* In these circumstances, the obstructionist actions must "completely undermine the purposes of the right to counsel." *Id.* If the defendant's actions also prevent the trial court from fulfilling the mandated inquiries of N.C. Gen. Stat. § 15A-1242, "the defendant has forfeited his or her right to counsel and the trial court is not required to abide by the statute's directive to engage in a colloquy regarding a knowing waiver." *Id.*

¶ 20 "Another situation that arises with some frequency in criminal cases is that of the defendant who waives the appointment of counsel and whose case is continued in order to allow [them] time to obtain funds with which to retain counsel." *Curlee*, 251 N.C. App. at 253, 795 S.E.2d at 270. A defendant's case may be continued several times before the defendant realizes they cannot afford to hire an attorney, which may cause judges and prosecutors to be "understandably reluctant to agree to further delay of the proceedings," or to "suspect that the defendant knew that [they] would be unable to hire a lawyer and was simply trying to delay the trial." *Id.* In such a situation, the trial court must inform the defendant that, if they do not want to be represented by appointed counsel and are unable to hire an attorney by the scheduled trial date, they "will be required to proceed to trial without the assistance of counsel, *provided that* the trial court informs the defendant of the consequences of proceeding *pro se* and conducts the inquiry required by N.C. Gen. Stat. § 15A-1242." *Id.* (emphasis in original).

¶ 21 Under N.C. Gen. Stat. § 15A-1242, "a defendant must be advised of the right to counsel, the consequences of proceeding without counsel, and 'the nature of the charges and proceedings and the range of permissible punishments' before the defendant can proceed without counsel." *Simpkins*, 373 N.C. at 541, 838 S.E.2d at 449 (quoting N.C. Gen. Stat. § 15A-1242 (2019)). "The record must affirmatively show that the inquiry was made and that the defendant, by [their] answers, was literate, competent, understood the consequences of [their] waiver, and voluntarily exercised [their] own free will." *State v. Pena*, 257 N.C. App. 195, 204, 809 S.E.2d 1, 7 (2017) (citation omitted). "A trial court's failure to conduct [this] inquiry entitles [the] defendant to a new trial." *State v. Seymore*, 214 N.C. App. 547, 549, 714 S.E.2d 499, 501 (2011). A trial court is only relieved of its obligation to conduct the colloquy required by N.C. Gen. Stat. § 15A-1242 when the defendant's conduct makes doing so impossible. *Simpkins*, 373 N.C. at 541, 838 S.E.2d at 449.

¶ 22 The transcript of the 18 September 2019 hearing demonstrates that the court determined this case to be one of the situations contemplated in *Curlee*. Accordingly, defendant was "required to proceed to trial without the assistance of counsel, *provided that* the trial court inform[ed] the defendant of the consequences of proceeding *pro se* and conduct[ed] the inquiry required by N.C. Gen. Stat. § 15A-1242." *Curlee*, 251 N.C. App. at 253, 795 S.E.2d at 270.

¶ 23 For the trial court's inquiry to satisfy the requirements of N.C. Gen. Stat. § 15A-1242, the trial court was required to advise defendant of the right to counsel, the consequences of proceeding without counsel, and "the nature of the charges and proceedings and the range of permissible punishments" before defendant could proceed without counsel. *Simpkins*, 373 N.C. at 541, 838 S.E.2d at 449 (quoting N.C. Gen. Stat. § 15A-1242 (2019)). Here, defendant was clearly advised of the right to counsel, as she had already been represented by several court appointed attorneys and had entered and withdrawn multiple waivers of the right to counsel. The trial court also reiterated that the order "doesn't preclude you from hiring your own attorney." With respect to the consequences of proceeding *pro se*, the trial court informed defendant that she would be responsible for negotiating any plea deal with the prosecutor, proceeding with discovery, jury selection, and any motions and trial, and that she would be "held to the same standard as an attorney." This portion of the colloquy also informed defendant of the nature of the proceedings and the range of permissible punishments. Therefore, we hold that the colloquy was sufficient. Because we hold that the colloquy was sufficient for the purposes of N.C. Gen. Stat. § 15A-1242, we further hold that the

trial court's order that defendant had "forfeited or effectively waived her right to be represented by counsel in this matter" was appropriate and not violative of the standards set out in *Simpkins*.

¶ 24 Assuming *arguendo* that the trial court's colloquy was insufficient for the purposes of N.C. Gen. Stat. § 15A-1242 and that an effective waiver did not occur, we hold that defendant forfeited the right to counsel. Although there is no bright-line definition on the degree of misconduct to justify forfeiture, several of the types of conduct contemplated in *Blakeney* and *Simpkins* occurred in this case. Defendant repeatedly fired appointed counsel, often within several days of their appointment. Defendant continued to alternatively seek appointed counsel or additional time to hire an attorney while filing and withdrawing multiple waivers of the right to appointed counsel.[2] Under these circumstances, defendant's actions completely frustrated the purpose of the right to counsel and prevented the trial court from moving the case forward. Accordingly, we hold that the trial court's finding that defendant forfeited the right to appointed counsel was warranted.

III. Conclusion

¶ 25 For the foregoing reasons, we hold the indictment was facially valid and the trial court did not err in concluding that defendant had forfeited her right to appointed counsel.

AFFIRMED.

Chief Judge STROUD concurs.

Judge JACKSON concurs in part and dissents in part.

JACKSON, Judge, concurring in part and dissenting in part.

¶ 26 I join the portion of the majority's opinion holding that the indictment charging Amy Regina Atwell ("Defendant") with attempting to purchase a firearm while subject to a domestic violence protective order prohibiting the same is facially valid. However, I respectfully dissent from the portion of the majority opinion holding that Defendant waived the right to counsel, or in the alternative, forfeited it.

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2. Although our courts have not directly considered the effect of multiple filed and withdrawn waivers of the right to appointed counsel in the context of forfeiture, we view this conduct as analogous to repeated firing of appointed counsel and consider this conduct in determining whether a defendant is engaged in "flagrant or extended delaying tactics."

¶ 27 North Carolina General Statute § 15A-1242 provides:

> A defendant may be permitted at his election to proceed in the trial of his case without the assistance of counsel only after the trial judge makes thorough inquiry and is satisfied that the defendant:
>
> (1) Has been clearly advised of his right to the assistance of counsel, including his right to the assignment of counsel when he is so entitled;
>
> (2) Understands and appreciates the consequences of this decision; and
>
> (3) Comprehends the nature of the charges and proceedings and the range of permissible punishments.

N.C. Gen. Stat. § 15A-1242 (2019). Our Supreme Court has held that trial courts are only relieved of the obligation to conduct the colloquy required by N.C. Gen. Stat. § 15A-1242 "in situations evincing egregious misconduct by a defendant[,]" *State v. Simpkins*, 373 N.C. 530, 535, 838 S.E.2d 439, 446 (2020), where the "defendant may be deemed to have forfeited the right to counsel because . . . the defendant has totally frustrated that right[,]" *id.* at 536, 838 S.E.2d at 446. "[A]bsent egregious conduct by the defendant, a defendant must be advised of the right to counsel, the consequences of proceeding without counsel, and 'the nature of the charges and proceedings and the range of permissible punishments' before the defendant can proceed without counsel." *Id.* at 541, 838 S.E.2d at 449 (quoting N.C. Gen. Stat. § 15A-1242).

¶ 28 Neither the trial court, nor Judge William A. Wood—who presided over a pretrial hearing on 18 September 2019—completed the colloquy required by N.C. Gen. Stat. § 15A-1242. Instead, Judge Wood concluded in a 20 September 2019 order that Defendant had forfeited the right to counsel. However, the record before us does not support Judge Wood's forfeiture conclusion. The majority erroneously concludes that Judge Wood's colloquy with Defendant on 18 September 2019 "was sufficient for purposes of the statute[,]" *State v. Atwell*, *supra* at 93, or alternatively, "that [D]efendant forfeited the right to counsel[,]" *id.* at 94. I disagree, and therefore respectfully dissent.

I. Standard of Review

The right to counsel in a criminal proceeding is protected by both the federal and state constitutions. Our

> review is *de novo* in cases implicating constitutional rights. Accordingly, we review *de novo* a trial court's determination that a defendant has either waived or forfeited the right to counsel.

Simpkins, 373 N.C. at 533, 838 S.E.2d at 444 (internal marks and citation omitted).

II. Waiver

¶ 29 As our Court has previously observed, the requirements of N.C. Gen. Stat. § 15A-1242 "are clear and unambiguous." *State v. Callahan*, 83 N.C. App. 323, 324, 350 S.E.2d 128, 129 (1986). "The inquiry is mandatory and must be made in every case in which a defendant elects to proceed without counsel[,]" *id.* (citation omitted), unless the defendant "forfeit[s] the right to counsel . . . and prevents the trial court from complying with N.C.G.S. § 15A-1242[,]" *Simpkins*, 373 N.C. at 541, 838 S.E.2d at 449. In the case of a valid waiver, "[t]he record must affirmatively show that the inquiry was made and that the defendant, by his answers, was literate, competent, understood the consequences of his waiver, and voluntarily exercised his own free will." *Callahan*, 83 N.C. App. at 324, 350 S.E.2d at 129 (citation omitted). "The purpose of the colloquy required by N.C. Gen. Stat. § 15A-1242 is to comply with the constitutional requirement that a waiver of the right to counsel be made 'knowingly, intelligently, and voluntarily.' " *State v. Harvin*, 268 N.C. App. 572, 593, 836 S.E.2d 899, 911 (2019) (quoting *State v. Blakeney*, 245 N.C. App. 452, 459-60, 782 S.E.2d 88, 93 (2016)).

¶ 30 The record of the 18 September 2019 hearing demonstrates not only that Defendant did *not* wish to proceed without counsel—Defendant requested that another attorney be appointed to represent her, not that she be allowed to proceed pro se—but also that Defendant did not waive her constitutional right to counsel "knowingly, intelligently, and voluntarily[.]" *Blakeney*, 245 N.C. App. at 459, 782 S.E.2d at 93. Judge Wood asked her, "What are you going to do about a lawyer?" She replied, "I can't afford to get a lawyer and still pay my rent and the living expenses. I thought one would take payments from me, but they won't. So at this time I would like to get another court appointed attorney." Judge Wood then summarized what he saw in the file related to the appointment of the attorneys that had withdrawn, whereupon Defendant explained, "I asked for a six month's continuance because I'm disabled and I'm low income. I knew that I would need at least a couple months. I can't pay my rent and my living expenses plus pay a lawyer in four weeks." Judge Wood responded, "Well I can see at least two occasions, perhaps three

you've requested a court appointed attorney and you've promptly fired that lawyer." Defendant replied:

> Two of them, yeah, for valid, valid reasons. And one of them that I had personal – that was taking payments for four months. The fourth month he up and said there was a conflict with another client, Vernon Clauser (ph). I don't know what the conflict is. I don't have any proceedings with him. And he said that I hadn't paid him. He was taking payments from me every month for four months. So that set me back for a while. And then this – the two other attorneys were totally going in two different ways of defense. Just to me they seemed like they were more on the Plaintiff's side than mine. I don't need an attorney like that. I've asked for a jury trial. I mean, I haven't seen anything filed. I did see where Peter Dwyer seemed to do the best work, in my opinion, because he did file for an arraignment back in June of 2018. He did file a motion for Discovery. I mean, he seems to be the most – I regret letting him go, but – just put it that way.

¶ 31 Judge Wood then asked the prosecutor, "Mr. [Prosecutor], what's your pleasure with this case, sir?" The prosecutor explained that Defendant had been offered to plead as charged and serve probation but that she had declined, and the State was ready to proceed. The following colloquy then transpired:

> THE COURT: Well, what I'm going to do is I'm going to put an order in the file basically saying you waived your right to have an attorney. If you would like to hire your own attorney, that will be fine, but based on these – the history of this file, it appears to me that your process in moving this case along has been nothing more than to see how long you can delay it until it goes away. The way you've behaved appears to be nothing more than a delay tactic and that's what I'm going to put an order in the file and I'm going to make specific findings as to everything I just told you and to some other things that are in the file. I'm going to let the prosecutor arraign you and set this case for trial. Do you understand that?
>
> THE DEFENDANT: Yes.

THE COURT: Now, that doesn't preclude you from hiring your own attorney. You can hire your own attorney but you're going to have to do that and have your attorney ready by the time the prosecutor has this case on the trial calendar. Additionally, if you don't hire an attorney, you're going to be responsible for representing yourself. Do you know what that means?

THE DEFENDANT: Representing myself.

THE COURT: Yes.

THE DEFENDANT: It means representing myself.

THE COURT: It does. It means you're going to have to negotiate any plea deal if there is one with the prosecutor. You're going to have to handle all the Discovery in this case. If there is a jury trial you're going to have to select a jury and keep up with any motions and try the case just as if you were an attorney and be held to the same standard as an attorney. You're not going to get legal advice from me or whoever the judge is. Do you understand that?

THE DEFENDANT: No, because I've already requested a jury trial.

THE COURT: Well what is it about that that you don't understand?

THE DEFENDANT: You said if I get a jury trial.

THE COURT: You're welcome – I mean, nobody's going to make you plead guilty. You can have a jury trial.

THE DEFENDANT: Thank you.

THE COURT: There's other ways for a case to go away. Do you understand that?

THE DEFENDANT: Okay.

THE COURT: I don't know what's ultimately going to have happen to this case [sic] but you are entitled to a jury trial most definitely. What I want you to understand is that if you represent yourself, you're

> going to be held to the same standards of an attorney. Do you understand that?
>
> THE DEFENDANT: You're giving me no choice. I mean, I asked for another court appointed attorney and you said no, so –
>
> THE COURT: You've had choice after choice after choice. You've been given a court appointed attorney on three[1] occasions, which is two more than you usually get.
>
> THE DEFENDANT: I've got the e-mails from one of the lawyers that was actually giving me wrong court dates to be in court.
>
> THE COURT: Well, one of the attorneys there is no indication as to why that attorney withdrew, the other took – you took them off the case, basically. So do you understand what's going on here, ma'am?
>
> THE DEFENDANT: You've denied me a court appointed attorney. Yes, I understand that.
>
> THE COURT: I've denied you a fourth court appointed attorney.
>
> THE DEFENDANT: I understand that, yes.

¶ 32 The record of the 18 September 2019 hearing thus shows that Judge Wood attempted to conduct the colloquy required by N.C. Gen. Stat. § 15A-1242 but did not complete it. It does *not* "show that . . . [D]efendant . . . understood the consequences of h[er] waiver, and voluntarily exercised h[er] own free will." *Callahan*, 83 N.C. App. at 324, 350 S.E.2d at 129. Instead, when Judge Wood asked Defendant whether she understood "that if you represent yourself, you're going to be held to the same standards of an attorney[,]" Defendant replied, "You're giving me no choice. I mean, I asked for another court appointed attorney and you said no[.]" Any purported waiver resulting from the 18 September 2019 hearing was not knowing, intelligent, and voluntary. *See Blakeney*, 245 N.C. App. at 459-60, 782 S.E.2d at 93. Accordingly, I would hold that the colloquy between Judge Wood and Defendant on 18 September 2019 did not suffice for purposes of N.C. Gen. Stat. § 15A-1242 because Judge Wood did not complete the colloquy, and the colloquy that did occur

1. As the majority notes, the correct number at that point was five.

demonstrates that any purported waiver resulting from the hearing was not knowing, intelligent, and voluntary. *See id.*

¶ 33 The majority asserts that this case is similar to a situation we described in *State v. Curlee*, 251 N.C. App. 249, 795 S.E.2d 266 (2016), where a

> defendant [] waives the appointment of counsel and [the] case is continued . . . [and] [b]y the time [] [the] defendant realizes that he cannot afford to hire an attorney, . . . judges and prosecutors are understandably reluctant to agree to further delay of the proceedings, or may suspect that the defendant knew that he would be unable to hire a lawyer and was simply trying to delay the trial.

Id. at 253, 795 S.E.2d at 270. In *Curlee*, we described a prophylactic measure a trial court could employ to prevent a delay of proceedings because of a defendant's failure to fully appreciate the cost of retaining private counsel and any associated logistical challenges that might present themselves until after some unsuccessful attempts to retain counsel had been made by a defendant:

> It is not improper in such a situation for the trial court to inform the defendant that, if he does not want to be represented by appointed counsel and is unable to hire an attorney by the scheduled trial date, he will be required to proceed to trial without the assistance of counsel, *provided that* the trial court informs the defendant of the consequences of proceeding *pro se* and conducts the inquiry required by N.C. Gen. Stat. § 15A-1242.

Id. (emphasis in original).

¶ 34 I believe the majority's comparison of this case to the situation described in *Curlee* is inapt for two reasons: (1) the procedure described in *Curlee* requires that "the trial court inform[] the defendant of the consequences of proceeding *pro se* and conduct[] the inquiry required by N.C. Gen. Stat. § 15A-1242[,]" *id.*, which did not happen here; (2) the procedure described in *Curlee* is to be used by trial courts when the defendant "*does not want to be represented by appointed counsel* and is unable to hire an attorney[,]" *id.* (emphasis added). It is clear from the record of the 18 September 2019 hearing that Defendant wanted to be represented by counsel—to that end, she requested the appointment of counsel be-

cause she could not afford to retain counsel. When Judge Wood asked Defendant what she was going to do about a lawyer, for example, she replied that she could not "afford to get a lawyer and still pay [her] rent and [] living expenses[,]" and requested that he appoint her counsel.

¶ 35 Without offering explanation or citing support in the record, the majority asserts that Judge Wood "determined this case to be one of the situations contemplated in *Curlee*." *State v. Atwell*, *supra* at 93. This unsupported assertion is belied by the transcript of the hearing before Judge Wood on 18 September 2019, as the portions of the transcript reproduced above reveal. The import of *Curlee* in this case is not that this case is an example of the successful use of the prophylactic measure we described in *Curlee*, but instead that *Curlee* outlines a procedure trial judges can employ in situations like the one that faced Judge Wood on 18 September 2019, provided, however, that the defendant (1) "does not want to be represented by appointed counsel and is unable to hire an attorney by the scheduled trial date"; and (2) "the trial court informs the defendant of the consequences of proceeding *pro se* and conducts the inquiry required by N.C. Gen. Stat. § 15A-1242." *Curlee*, 251 N.C. App. at 253, 795 S.E.2d at 270. I would therefore hold that the situation described in *Curlee* is distinguishable.

III. Forfeiture

¶ 36 In *Simpkins*, our Supreme Court held for the first time that "a defendant may be deemed to have forfeited the right to counsel because, by his or her own actions, the defendant has totally frustrated that right." 373 N.C. at 536, 838 S.E.2d at 446. Our Court has since recognized that in *Simpkins*, "[t]he Supreme Court synthesized our precedent and announced the test to apply in forfeiture cases: 'A finding that a defendant has forfeited the right to counsel requires egregious dilatory or abusive conduct on the part of the defendant which undermines the purposes of the right to counsel.' " *State v. Patterson*, 846 S.E.2d 814, 818 (N.C. Ct. App. 2020) (quoting *Simpkins*, 373 N.C. at 541, 838 S.E.2d at 449). "Importantly, the Supreme Court rejected this Court's precedent holding that 'willful actions on the part of the defendant that result in the absence of defense counsel,' standing alone, can support forfeiture." *Id.* (quoting *Simpkins*, 373 N.C. at 539, 838 S.E.2d at 448).

¶ 37 The forfeiture conclusion in Judge Wood's order does not meet the *Simpkins* standard. Defendant's conduct, like Mr. Simpkins's conduct, "while probably highly frustrating, was not so egregious that it frustrated the purposes of the right to counsel itself." *Simpkins*, 373 N.C. at 539, 838 S.E.2d at 448. Nothing in the record indicates how many

times the State continued the case or was not ready to proceed. In fact, the State waited almost six months from charging Defendant to secure an indictment. Further, nothing in the record indicates that any of the lawyers who had previously represented Defendant withdrew because Defendant was refusing to *participate* in preparing a defense. We also do not know why several of the attorneys withdrew, other than one having a conflict with another client according to Defendant. Instead, to the extent it discloses any information on the subject, the record tends to show that Defendant had differences with her prior lawyers related to the preparation of her defense and defense strategy. For example, her differences with her first lawyer appear to have been related to a jurisdictional argument she raised in a pro se motion filed on 8 May 2018 regarding the subject matter jurisdiction of Union County Superior Court over a crime she committed in Tennessee while residing in Tennessee—an argument that does not appear to have ever been addressed below and is not patently frivolous.

¶ 38 The American Bar Association has put forth standards for conduct of attorneys for over 50 years. These standards have been cited in hundreds of court opinions, including at least 120 United States Supreme Court opinions. In particular, Standard 4-5.2 entitled "Control and Direction of the Case" provides:

> Certain decisions relating to the conduct of the case are for the accused; others are for defense counsel. Determining whether a decision is ultimately to be made by the client or by counsel is highly contextual, and counsel should give great weight to strongly held views of a competent client regarding decisions of all kinds.

ABA Standards for Criminal Justice 4-5.2 (4th ed. 2017) ("The Defense Function"). The record before this Court contains no reasons for the withdrawal of counsel other than that Defendant had some strongly held views that she did not wish to plead guilty in exchange for probation and that she wanted to challenge some jurisdictional elements of the State's case. Defendant's strongly held views about the case were not a basis for concluding that she forfeited the right to counsel because she did not engage in any "egregious dilatory or abusive conduct . . . [that] undermine[d] the purposes of the right to counsel and prevent[ed] the trial court from complying with N.C.G.S. § 15A-1242." *Simpkins*, 373 N.C. at 541, 838 S.E.2d at 449.

¶ 39 Further, nothing in the record indicates that Defendant mistreated her prior attorneys by physically assaulting them or even by being verbally abusive. The defendant in *Simpkins* refused to acknowledge the authority of the court. *Id.* at 539, 838 S.E.2d at 448. He refused to answer the trial court's questions and posed his own repeated questions to the court. *Id.* He spoke out of turn and challenged the court with extraneous statements. *Id.*

¶ 40 The transcript of the 18 September 2019 hearing before Judge Wood demonstrates that Defendant was polite at the hearing. When in court, Defendant normally answered questions appropriately, even saying yes sir or no sir to the court on occasion. The only instance in the record of Defendant being less than courteous toward the court is in the transcript of the day of her sentencing, over three months after Judge Wood entered his order regarding forfeiture. Defendant's requests for the court to appoint her a sixth lawyer and for a third continuance on 18 September 2019 did not "totally frustrat[e] the ability of the trial court to reach an outcome[.]" *Id.* at 536, 838 S.E.2d at 446. In fact, if the court had simply appointed her an attorney at that point, counsel would have had over three months to prepare for the trial of the matter without the need for further continuance.

¶ 41 While the majority's assertion that Judge Wood "determined this case to be one of the situations contemplated in *Curlee*[,]" *State v. Atwell*, *supra* at 93, is unsupported by the record, Defendant's history of requesting continuances and the appointment of new counsel is certainly reminiscent of the situation described in *Curlee*: "[D]efendant [] waive[d] the appointment of counsel and [her] case [was] continued in order to allow [her] time to obtain funds with which to retain counsel." 251 N.C. App. at 253, 795 S.E.2d at 270. "By the time . . . [she] realize[d] that [she] [could] []not afford to hire an attorney, [her] case [] ha[d] been continued" twice. *Id.* "At that point, [the] judge[] and prosecutor[] [were] understandably reluctant to agree to further delay of the proceedings, or may [have] suspect[ed] that [] [D]efendant knew that [she] would be unable to hire a lawyer and was simply trying to delay the trial." *Id.* However, nothing in the record indicates that Judge Wood or any other judge presiding over a hearing in this case followed our suggestion in *Curlee* to "inform [] [D]efendant that, if [she] does not want to be represented by appointed counsel and is unable to hire an attorney by the scheduled trial date, [she] w[ould] be required to proceed to trial without the assistance of counsel, . . . inform[ing] [] [D]efendant of the consequences of proceeding *pro se* and conduct[ing] the inquiry required by N.C. Gen. Stat. § 15A-1242." *Id.*

¶ 42 Under *Simpkins*, forfeiture requires egregious misconduct that obstructs or delays the proceedings and the record before this panel simply does not support that determination here. *See* 373 N.C. at 541, 838 S.E.2d at 449. Instead, the record before us suggests that appointing Defendant a lawyer would have facilitated reaching an outcome in the case rather than frustrating it and therefore, I would hold that Judge Wood's forfeiture conclusion was error. Accordingly, I respectfully dissent.

STATE OF NORTH CAROLINA
v.
CHRISTOPER GENE CRAWFORD, DEFENDANT

No. COA20-180

Filed 15 June 2021

1. Criminal Law—withdrawal of a guilty plea—Alford plea—fair and just reason to withdraw—consideration of factors

After defendant entered an *Alford* plea to charges of felony larceny of a motor vehicle and felony possession of a stolen motor vehicle, the trial court properly denied defendant's motion to withdraw the plea where defendant failed to demonstrate a fair and just reason for permitting withdrawal under the factors stated in *State v. Handy*, 326 N.C. 532 (1990). Although the State's proffered evidence of defendant's guilt was not significant, defendant did not assert his innocence until after the court denied his motion to withdraw the plea, defendant waited two months before filing that motion, and nothing in the record indicated that defendant wavered on his decision to enter an *Alford* plea or that his desire to withdraw the plea resulted from a "swift change of heart."

2. Criminal Law—guilty plea—Alford plea—factual basis

The trial court did not err in accepting defendant's *Alford* plea to charges of felony larceny of a motor vehicle and felony possession of a stolen motor vehicle, where the indictments provided sufficient factual descriptions of defendant's particular alleged conduct—which included significant factual details beyond the charges alleged—such that, taken together with the Transcript of Plea, the court was able to make an independent judicial determination as to whether a factual basis existed for defendant's plea, as required by N.C.G.S. § 15A-1022(c).

STATE v. CRAWFORD

[278 N.C. App. 104, 2021-NCCOA-272]

Appeal by Defendant from judgment entered 30 July 2019 by Judge David A. Phillips in Burke County Superior Court. Heard in the Court of Appeals 3 November 2020.

Attorney General Joshua H. Stein, by Assistant Attorney General Stephanie C. Lloyd, for the State.

Charlotte Gail Blake for defendant-appellant.

MURPHY, Judge.

¶ 1 When a defendant moves to withdraw his guilty plea, he must demonstrate there is a fair and just reason to do so. Here, Defendant did not demonstrate he had a fair and just reason to withdraw his plea and the trial court did not err in denying Defendant's motion to withdraw his *Alford* plea.[1]

¶ 2 Additionally, when accepting a plea agreement, there must be a factual basis pursuant to N.C.G.S. § 15A-1022(c). The indictments in this matter provided a factual description of Defendant's particular alleged conduct such that, when taken together with the *Transcript of Plea*, the Record was sufficient to satisfy the requirements of the statute. The trial court was able to make an independent judicial determination that there was a factual basis for Defendant's *Alford* plea and did not err in accepting the plea.

BACKGROUND

¶ 3 Defendant Christopher Gene Crawford ("Defendant") was indicted on one count of felony larceny of a motor vehicle, alleging he "unlawfully, willfully, and feloniously did steal, take and carry away a vehicle, a 2004 Toyota Tundra Truck, the personal property of Julie Cline and/or Timothy Cline, such property having a value in excess of One Thousand Dollars ($1,000.00)." Defendant was also indicted on one count of felony possession of a stolen motor vehicle, alleging he

> unlawfully, willfully, and feloniously did possess a vehicle, a 2011 White Chevy Silverado, the personal

1. An *Alford* plea allows a defendant to "voluntarily, knowingly, and understandingly consent to the imposition of a prison sentence even if he is unwilling or unable to admit his participation in the acts constituting the crime." *North Carolina v. Alford*, 400 U.S. 25, 37, 27 L. Ed. 2d 162, 171 (1970). A defendant enters into an *Alford* plea when he proclaims he is innocent, but "intelligently concludes that his interests require entry of a guilty plea and the record before the judge contains strong evidence of actual guilt." *Id.*

> property of R.H. Barringer D/B/A Best of Beers, located at 1613 Main Avenue Drive NW, Hickory NC 28601, which was stolen property and which [Defendant] knew and had reason to believe had been stolen and unlawfully taken.

Following a mistrial in March 2019 before the Honorable Lisa C. Bell, Defendant entered an *Alford* plea to both charges on 13 May 2019 by signing and swearing to a transcript of plea before the Honorable Joseph N. Crosswhite. Pursuant to the plea agreement, Defendant's convictions were consolidated for sentencing, which was set for 3 June 2019. Defendant failed to appear on 3 June 2019 and a warrant was issued for his arrest.

¶ 4 After his arrest, Defendant appeared for sentencing on 30 July 2019 before the Honorable David A. Phillips. The trial court allowed Defendant to be heard, and he moved to withdraw his *Alford* plea, arguing he was subjected to "[e]xcessive bail, ineffective counsel, insufficient evidence, selective prosecution, prosecutorial misconduct, due process of law, [and] a fast and speedy trial." Defendant also claimed his signature on the plea transcript did not include his full name and his counsel was ineffective because he did not ask a witness a certain question. The trial court denied Defendant's motion and imposed an active sentence of 20 to 33 months. Defendant orally gave notice of appeal and later filed a *Petition for Writ of Certiorari* asking us "to review whether the trial court erred in accepting the [*Alford*] plea . . . because there is not a factual basis of record for either of the charges."

ANALYSIS

¶ 5 Defendant argues two issues on appeal: (A) the trial court erred in denying his motion to withdraw his *Alford* plea; and (B) the trial court erred in accepting his *Alford* plea when there was no factual basis for the plea.

A. Motion to Withdraw the *Alford* Plea

¶ 6 **[1]** Defendant argues the trial court erred in denying the motion to withdraw his *Alford* plea. Defendant contends the trial court was required to grant his motion because he presented fair and just reasons for withdrawal. We disagree.

> In reviewing a decision of the trial court to deny [a] defendant's motion to withdraw, the appellate court does not apply an abuse of discretion standard, but instead makes an independent review of the record.

> That is, the appellate court must itself determine, considering the reasons given by the defendant and any prejudice to the State, if it would be fair and just to allow the motion to withdraw.

State v. Marshburn, 109 N.C. App. 105, 108, 425 S.E.2d 715, 718 (1993) (internal citation and marks omitted). We perform the same analysis, whether a defendant pleas guilty or pleas guilty pursuant to *Alford*. *See State v. Chery*, 203 N.C. App. 310, 314, 691 S.E.2d 40, 44 (2010) ("[W]e hold that for purposes of our analysis in the instant case that there is no material difference between a no contest plea and an *Alford* plea."); *State v. Alston*, 139 N.C. App. 787, 792, 534 S.E.2d 666, 669 (2000) (internal marks omitted) ("[A]n '*Alford* plea' constitutes a guilty plea in the same way that a plea of *nolo contendere* or no contest is a guilty plea."); *Alford*, 400 U.S. at 37, 27 L. Ed. 2d at 171 (stating there is no "material difference between a plea that refuses to admit commission of the criminal act and a plea containing a protestation of innocence").

¶ 7 "Although there is no absolute right to withdraw a guilty plea, withdrawal motions made prior to sentencing, and especially at a very early stage of the proceedings, should be granted with liberality." *State v. Meyer*, 330 N.C. 738, 742-43, 412 S.E.2d 339, 342 (1992) (internal marks omitted); *see State v. Handy*, 326 N.C. 532, 536, 391 S.E.2d 159, 161 (1990) ("In a case where the defendant seeks to withdraw his guilty plea before sentence, he is generally accorded that right if he can show any fair and just reason."). It is well settled that "[t]he defendant has the burden of showing that his motion to withdraw is supported by some 'fair and just reason.' " *Marshburn*, 109 N.C. App. at 108, 425 S.E.2d at 717 (quoting *Meyer*, 330 N.C. at 743, 412 S.E.2d at 342).

> Whether the reason is "fair and just" requires a consideration of a variety of factors. Factors which support a determination that the reason is "fair and just" include: the defendant's assertion of legal innocence; the weakness of the State's case; a short length of time between the entry of the guilty plea and the motion to withdraw; that the defendant did not have competent counsel at all times; that the defendant did not understand the consequences of the guilty plea; and that the plea was entered in haste, under coercion or at a time when the defendant was confused. If the defendant meets his burden, the [trial] court must then consider any substantial prejudice to the State caused by the withdrawal of the plea.

Id. at 108, 425 S.E.2d at 717-18 (citing *Handy*, 326 N.C. at 539, 391 S.E.2d at 163). This list is non-exclusive. *Handy*, 326 N.C. at 539, 391 S.E.2d at 163.

¶ 8 These factors were first enumerated in *Handy*, and have subsequently been applied by our appellate courts in determining whether the denial of a defendant's motion to withdraw an *Alford* plea was proper. *Id.*

> In considering each *Handy* factor individually, a court is not required to expressly find that a particular factor benefits either the defendant or the State in assessing whether a defendant has shown any fair and just reason for the withdrawal of a guilty plea. In *Handy*, [our Supreme Court] listed "[s]ome of the factors which favor withdrawal." *Handy*, 326 N.C. at 539, 391 S.E.2d at 163. This depiction of the identification of the *Handy* factors inherently illustrates that the slate of them is not intended to be exhaustive nor definitive; rather, they are designed to be an instructive collection of considerations to aid the court in its overall determination of whether sufficient circumstances exist to constitute any fair and just reason for a defendant's withdrawal of a guilty plea.

State v. Taylor, 374 N.C. 710, 723, 843 S.E.2d 46, 55 (2020). We address each of the *Handy* factors below.

1. Strength of the State's Case

¶ 9 Defendant argues the Record is silent regarding the strength of the State's case because the trial court did not inquire about the State's forecasted evidence.

¶ 10 We previously analyzed this factor in *State v. Davis*. *State v. Davis*, 150 N.C. App. 205, 207-08, 562 S.E.2d 590, 592 (2002). In *State v. Davis*, the defendant was indicted for second-degree murder, driving while impaired, and felony hit and run. *Id.* at 205, 562 S.E.2d at 591. The defendant pled guilty to all the charges, then filed a motion to withdraw his plea the day before his sentencing hearing. *Id.* On appeal, the defendant argued the trial court erred in denying his motion to withdraw his guilty plea. *Id.* We held the strength of the State's case was "significant" because

> the State was prepared to offer several eyewitnesses who would have testified to [the] defendant's drunken condition at the time the accident occurred and his erratic driving. The State was also prepared to enter

> evidence of [the] defendant's blood alcohol content being .23 at the time of the accident, along with [the] defendant's two prior convictions for drunk driving.

Id. at 207-08, 562 S.E.2d at 592. Additionally, a strong, uncontested forecast of evidence weighs against allowing a defendant to withdraw his plea. *Chery*, 203 N.C. App. at 315-16, 691 S.E.2d at 45.

¶ 11 "We must view the State's proffer based upon what was presented to the [trial] court at the plea hearing." *Id.* at 315, 691 S.E.2d at 45. However, we are not able to apply this concept from *Chery* to this case as the trial court judge, Judge Phillips, considering the motion to withdraw the guilty plea and in turn the strength of the State's case, was not privy to the State's forecast of evidence to Judge Crosswhite at the time of taking the plea. Even if we were able to consider the forecasted evidence presented at the plea hearing, it too is devoid of forecasted evidence or witnesses that would show the State had a strong case against Defendant. At the plea hearing, the State was prepared to offer a witness who would have testified against Defendant, but she failed to appear:

> [THE STATE]: . . . . We have had in-chambers conference about this case. Given where we are right now, Your Honor, the State would ask to show cause the witness in this case who has been personally served. Her name is Laura Jean Williams. The subpoena with personal service should appear in the court file.
>
> Laura Jean Williams. She had notice to be here this morning, Your Honor. She has yet to appear in the courthouse.
>
> THE COURT: We will certainly allow that request.
>
> . . .
>
> [THE STATE]: Your Honor, I know the [c]ourt is aware of the reason for the plea, but for the purposes of the record without the witness that has now been show caused, the State would have a difficult time proving this case; thus, the plea.

¶ 12 Due to Laura Jean Williams' failure to appear at the sentencing hearing, we are unable to determine what she would testify to, and unable to determine whether the State's case against Defendant was weak or strong. Unlike the State's proffer in *Davis*, the State's proffer here is not

significant because "the State would have a difficult time proving this case[.]" This factor weighs in favor of Defendant.

2. Defendant's Assertion of Legal Innocence

¶ 13 Defendant argues because "he had entered an *Alford* plea, [Defendant] had never admitted that he was guilty."

¶ 14 We have previously held "the fact that the plea that [a] defendant seeks to withdraw was a no contest or an *Alford* plea does not conclusively establish the factor of assertion of legal innocence for purposes of the *Handy* analysis." *Chery*, 203 N.C. App. at 315, 691 S.E.2d at 44. Defendant has failed to show how entering an *Alford* plea weighs in favor of withdrawal.

¶ 15 During sentencing, the following exchange occurred:

> [DEFENSE COUNSEL]: . . . . [Defendant] says that he desires to try - - or to withdraw his plea. He says he didn't sign the plea transcript, although he swore to it in open court. . . . [Defendant] thinks that he's been - - was held without bond, or excessive bond and wants to address the court on a number of issues that I've just touched on. I may not have touched on what he wanted to address the court about.
>
> THE COURT: Sir, I'll hear you on the sentencing on this case today. Are there any issues concerning that?
>
> [DEFENDANT]: No, sir, I'd like to withdraw that plea, sir, and take it back to trial if that's what the prosecutor would like to do. Like I said, I've been violated on a lot of constitutional rights. I have been. Excessive bail, ineffective counsel, insufficient evidence, selective prosecution, prosecutorial misconduct, due process of law, a fast and speedy trial. I mean, I've been violated on all kinds of constitutional violations. And I'm not - - I'm not admitting guilty to this charge. I'm not.
>
> . . . .
>
> But anyway, nevertheless, I have changed. And you know, my rights have been violated. And Your Honor, if you, you know, if - - you would like to address some of these motions that I have filed, that would be awesome. But as to [the felony larceny of a motor

> vehicle and felony possession of a stolen motor vehicle charges], I'm not going to plead guilty to it.

Defendant told the trial court, "I'm not admitting guilty to this charge. I'm not" and "I'm not going to plead guilty to it." Although at first glance this portion of the transcript appears to be a protestation of innocence, upon reading the entire Record we cannot determine whether Defendant was claiming actual innocence of the charges to which he entered an *Alford* plea.

¶ 16 It was only *after* the trial court denied Defendant's motion to withdraw his *Alford* plea that Defendant stated, "No, no, no, that's the thing. I'm not guilty of this charge." Reviewing the entire Record, we are not convinced Defendant protested his innocence of the relevant charges in his motion to withdraw his plea. *See State v. Lankford*, 266 N.C. App. 211, 215-16, 831 S.E.2d 109, 113 (holding the defendant did not claim actual innocence when he told the trial court "I'm not guilty of these charges that they've charged me with" and "I just feel like if everything is brought out in every case that every officer has charged me with, I know what I'm guilty of and I know what I'm not guilty of. I'm not guilty of all these charges"), *disc. rev. denied*, 373 N.C. 176, 833 S.E.2d 625 (2019). Defendant has failed to show how this factor supports withdrawal of his *Alford* plea.

3. Timeliness of the Motion

¶ 17 Prior cases have "placed heavy reliance on the length of time between a defendant's entry of a guilty plea and motion to withdraw the plea." *State v. Robinson*, 177 N.C. App. 225, 229, 628 S.E.2d 252, 255 (2006). Our Supreme Court articulated the rationale behind this heavy reliance in *Handy*:

> A swift change of heart is itself strong indication that the plea was entered in haste and confusion; furthermore, withdrawal shortly after the event will rarely prejudice the Government's legitimate interests. By contrast, if the defendant has long delayed his withdrawal motion, and has had the full benefit of competent counsel at all times, the reasons given to support withdrawal must have considerably more force.

Handy, 326 N.C. at 539, 391 S.E.2d at 163. *Handy* also instructs a defendant's motion to withdraw his plea "at a very early stage of the proceedings[] should be granted with liberality[.]" *Id.* at 537, 391 S.E.2d at 162.

¶ 18 In *Handy*, the defendant successfully moved to withdraw his plea less than 24 hours after it was entered because he "had an opportunity to more fully consider [the] decision and pray about it overnight, as well as discuss it with his mother and with his attorneys." *Id.* at 540-41, 391 S.E.2d at 163-64. The defendant there testified he "felt that he 'was under pressure under the circumstances' " and expressed he "had misgivings about [entering the plea] at the time the plea was entered." *Id.* Our Supreme Court held the defendant "made a sufficient showing of a fair and just reason to withdraw his plea of guilty" because the evidence showed the defendant changed his mind "at a very early stage of the proceedings," after praying about his decision and speaking with his mother. *Id.* at 542, 537, 391 S.E.2d at 164, 162.

¶ 19 Conversely, the defendant in *Robinson* unsuccessfully made his motion to withdraw his guilty plea three-and-a-half-months after it was entered. *Robinson*, 177 N.C. App. at 230, 628 S.E.2d at 255. We distinguished *Robinson* from *Handy* by noting a delay of three-and-a-half-months is longer than a 24-hour delay and closer to circumstances in past cases where motions to withdraw had been made, and subsequently denied, one month and eight months after entry of the guilty plea. *Id.* at 230, 628 S.E.2d at 255 (citing *State v. Graham*, 122 N.C. App. 635, 637-38, 471 S.E.2d 100, 101-02 (1996) and *Marshburn*, 109 N. C. App. at 109, 425 S.E.2d at 718).

¶ 20 Here, it is undisputed Defendant waited until the sentencing hearing on 30 July 2019 to file a motion to withdraw his *Alford* plea, over two months after entering the *Alford* plea on 13 May 2019. Unlike in *Handy*, Defendant does not argue, and there is nothing in the Record to indicate Defendant's desire to withdraw his *Alford* plea was based upon "[a] swift change of heart," such as "an opportunity to more fully consider [the] decision and pray about it overnight, as well as discuss it with his mother and with his attorneys." *Handy*, 326 N.C. at 539, 541, 391 S.E.2d at 163, 164. Defendant executed the plea transcript approximately two months prior to the plea hearing. There is no indication in the Record that during this time Defendant wavered on his decision. Defendant has failed to show how this factor supports withdrawal of his *Alford* plea.

4. Ineffective Assistance of Counsel

¶ 21 Defendant argues he "did not believe that he had competent counsel throughout the proceedings. [Defendant] even asked Judge Phillips whether he could fire his attorney during the sentencing hearing."

¶ 22 In order to show ineffective assistance of counsel ("IAC"), "a defendant must show that (1) counsel's performance was deficient and (2)

the deficient performance prejudiced the defense." *State v. Phillips*, 365 N.C. 103, 118, 711 S.E.2d 122, 135 (2011) (internal marks omitted), *cert. denied*, 565 U.S. 1204, 182 L. Ed. 2d 176 (2012).

> Deficient performance may be established by showing that counsel's representation fell below an objective standard of reasonableness. Generally, to establish prejudice, a defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.

State v. Allen, 360 N.C. 297, 316, 626 S.E.2d 271, 286 (internal citation and marks omitted), *cert. denied*, 549 U.S. 867, 166 L. Ed. 2d 116 (2006).

¶ 23 "In general, claims of ineffective assistance of counsel should be considered through motions for appropriate relief and not on direct appeal." *State v. Stroud*, 147 N.C. App. 549, 553, 557 S.E.2d 544, 547 (2001), *cert. denied*, 356 N.C. 623, 575 S.E.2d 758 (2002). "IAC claims brought on direct review will be decided on the merits when the cold record reveals that no further investigation is required, i.e., claims that may be developed and argued without such ancillary procedures as the appointment of investigators or an evidentiary hearing." *State v. Fair*, 354 N.C. 131, 166, 557 S.E.2d 500, 524, *reconsideration denied*, 354 N.C. 576, 558 S.E.2d 862 (2001), *cert. denied*, 535 U.S. 1114, 153 L. Ed. 2d 162 (2002). If an appellate court determines an IAC claim has been improperly asserted on direct appeal, "it shall dismiss those claims without prejudice to the defendant's right to reassert them during a subsequent [motion for appropriate relief] proceeding." *Id.* at 167, 557 S.E.2d at 525.

¶ 24 Here, Defendant argues he had incompetent counsel and the trial court erred by "summarily den[ying] [Defendant's] motion [to withdraw his *Alford* plea] without . . . giving [Defendant] the opportunity to address his concerns." Based on the cold Record before us, we are unable to adequately assess Defendant's IAC claim. We "express no opinion as to whether this factor weighs in favor of Defendant or the State for purposes of the *Handy* factors." *Taylor*, 374 N.C. at 722, 843 S.E.2d at 54.

5. Comprehension of the *Alford* Plea's Terms, Coercion, Haste, and Confusion

¶ 25 The final *Handy* factors to be considered are "that the defendant did not understand the consequences of the guilty plea [] and that the plea was entered in haste, under coercion or at a time when the defendant

was confused." *Marshburn*, 109 N.C. App. at 108, 425 S.E.2d at 718 (citing *Handy*, 326 N.C. at 539, 391 S.E.2d at 163). Defendant does not argue he did not understand the consequences of his *Alford* plea or that the *Alford* plea was entered in haste, under coercion or at time when he was confused. We consider any argument regarding these factors to be abandoned. *See Chery*, 203 N.C. App. at 313, 691 S.E.2d at 44 ("We confine our analysis to those factors set out in [the] defendant's brief."); N.C. R. App. P. 28(b)(6) (2021) ("Issues not presented in a party's brief, or in support of which no reason or argument is stated, will be taken as abandoned.").

6. Consideration of the *Handy* Factors

¶ 26 The *Handy* factors "are designed to be an instructive collection of considerations to aid the court in its overall determination of whether sufficient circumstances exist to constitute any fair and just reason for a defendant's withdrawal of a guilty plea." *Taylor*, 374 N.C. at 723, 843 S.E.2d at 55. "No one of these factors is determinative." *Chery*, 203 N.C. App. at 313, 691 S.E.2d at 43. However, our appellate courts have historically placed a "heavy reliance on the length of time between a defendant's entry of [a] guilty plea and [a] motion to withdraw the plea." *Robinson*, 177 N.C. App. at 229, 628 S.E.2d at 255.

¶ 27 As discussed above, Defendant has failed to show that the timeliness of his motion supports withdrawal; Defendant did not indicate that his desire to withdraw his *Alford* plea was based upon a swift change of heart, such as in *Handy*, nor is there anything in the Record to indicate during the time before Defendant made his motion to withdraw that he wavered on his decision to plead guilty pursuant to *Alford*. In addition, Defendant did not assert innocence until *after* the trial court had denied Defendant's motion to withdraw his *Alford* plea. Although the State's proffer of evidence was not significant here, the other *Handy* factors, namely Defendant's assertion of legal innocence and timeliness of the motion, weigh in favor of the denial of Defendant's motion to withdraw. As for ineffective assistance of counsel, we express no opinion as to whether this factor weighs in favor of Defendant or the State and we do not consider it for the purposes of our analysis.

¶ 28 Having examined each of the factors identified in *Handy*, we hold Defendant has failed to show there is a fair and just reason for the withdrawal of his plea.

B. Factual Basis for the *Alford* Plea

¶ 29 **[2]** Defendant argues the trial court erred in accepting his *Alford* plea because "there was nothing of record presented to the trial court to allow the

[trial] court to make an independent judicial determination as to whether there was a factual basis for [Defendant's] plea[.]" As Defendant raises an alleged statutory violation, we review his argument de novo. *See State v. Mackey*, 209 N.C. App. 116, 120, 708 S.E.2d 719, 721 (internal citation omitted) ("Alleged statutory errors are questions of law and as such, are reviewed *de novo*."), *disc. rev. denied*, 365 N.C. 193, 707 S.E.2d 246 (2011).

1. Appellate Jurisdiction

¶ 30 Contemporaneously with his appeal, Defendant filed a *Petition for Writ of Certiorari* regarding the lack of a factual basis to support his *Alford* plea. However, we dismiss the petition as moot as Defendant is entitled to appellate review as a matter of right.

¶ 31 N.C.G.S. § 15A-1444(e) provides, in pertinent part:

> Except as provided in subsections (a1) and (a2) of this section and [N.C.G.S. §] 15A-979, and except when a motion to withdraw a plea of guilty or no contest has been denied, the defendant is not entitled to appellate review as a matter of right when he has entered a plea of guilty or no contest to a criminal charge in the [S]uperior [C]ourt, but he may petition the appellate division for review by writ of certiorari.

N.C.G.S. § 15A-1444(e) (2019). Pursuant to N.C.G.S. § 15A-1444(e), a defendant who has entered a guilty plea is not entitled to appellate review as a matter of right, unless the defendant is appealing sentencing issues or the denial of a motion to suppress, or the defendant has made an unsuccessful motion to withdraw the guilty plea. *Id.*; *see State v. Dickens*, 299 N.C. 76, 79, 261 S.E.2d 183, 185 (1980) ("When the language of [N.C.G.S. § 15A-1444(e)] is read conversely, it provides that when a motion to withdraw a plea of guilty or no contest has been denied, the defendant is entitled to appellate review as a matter of right when he has entered a plea of guilty or no contest to a criminal charge in the [S]uperior [C]ourt.").

¶ 32 Here, Defendant made a motion to withdraw his *Alford* plea, which was subsequently denied. He is entitled to appellate review as a matter of right and we dismiss his *Petition for Writ of Certiorari* as moot. We now address the merits of Defendant's arguments.

2. Independent Judicial Determination

¶ 33 "Because a guilty plea waives certain fundamental constitutional rights such as the right to a trial by jury, our legislature has enacted laws

to ensure guilty pleas are informed and voluntary." *State v. Agnew*, 361 N.C. 333, 335, 643 S.E.2d 581, 583 (2007). One of those laws, N.C.G.S. § 15A-1022(c), requires that prior to accepting a plea of guilty, the trial court must determine there is a factual basis for the plea:

> The judge may not accept a plea of guilty or no contest without first determining that there is a factual basis for the plea. This determination may be based upon information including but not limited to:
>
> (1) A statement of the facts by the prosecutor.
>
> (2) A written statement of the defendant.
>
> (3) An examination of the presentence report.
>
> (4) Sworn testimony, which may include reliable hearsay.
>
> (5) A statement of facts by the defense counsel.

N.C.G.S. § 15A-1022(c) (2019).

"The five sources listed in [N.C.G.S. § 15A-1022(c)] are not exclusive, and therefore the trial judge may consider any information properly brought to his attention." *State v. Collins*, 221 N.C. App. 604, 606, 727 S.E.2d 922, 924 (2012). Further, in enumerating these five sources, the statute "contemplate[s] that some substantive material independent of the plea itself appear of record which tends to show that [the] defendant is, in fact, guilty." *State v. Sinclair*, 301 N.C. 193, 199, 270 S.E.2d 418, 421-22 (1980). Such information "must appear in the record, so that an appellate court can determine whether the plea has been properly accepted." *Id.* at 198, 270 S.E.2d at 421.

¶ 34 Defendant argues the trial court erred in accepting his *Alford* plea because "there was nothing of record presented to the trial court to allow the [trial] court to make an independent judicial determination as to whether there was a factual basis for [Defendant's] plea." The State argues the *Transcript of Plea*, the indictments, and the transcript of testimony from Defendant's mistrial provide a sufficient factual basis for us to affirm the trial court's acceptance of Defendant's *Alford* plea. However, we cannot consider the mistrial transcript in our review as that was not before the trial court when taking Defendant's plea. Judge Bell presided over Defendant's mistrial in March 2019, while Judge Crosswhite presided over Defendant's plea hearing on 13 May 2019. The Record does not indicate Judge Crosswhite was provided and/or reviewed the "over one-hundred pages of testimony and

eight entered exhibits that supplement [D]efendant's indictments and plea transcript." *See State v. Flint*, 199 N.C. App. 709, 726, 682 S.E.2d 443, 453 (2009) (explaining that when it is unclear if information was before the trial court during the defendant's plea hearing, then that information cannot be considered in a factual basis determination, even when contained in the record on appeal). Without the mistrial transcript, we are left with the *Transcript of Plea* and the indictments.

¶ 35 Our Supreme Court has previously held a *Transcript of Plea*, in and of itself, cannot provide the factual basis for an *Alford* plea. *Sinclair*, 301 N.C. at 199, 270 S.E.2d at 421 ("[T]he Transcript of Plea itself [does not] provide a factual basis for the plea. A defendant's bare admission of guilt, or plea of no contest, always contained in such transcripts, does not provide the 'factual basis' contemplated by [N.C.G.S. §] 15A-1022(c)."). Further, in *State v. Agnew*, our Supreme Court held an "indictment [that] simply stated the charge and did not provide any further factual description of [the] defendant's particular alleged conduct[,]" taken together with the *Transcript of Plea*, was insufficient to serve as a factual basis for accepting the plea. *Agnew*, 361 N.C. at 337, 643 S.E.2d at 584. In *Agnew*, the indictment alleged:

> On or about 23 April 2003 and in Pitt County the defendant named above unlawfully, willfully and feloniously did traffick cocaine by possession of in excess of 200 grams but less than 400 grams of a mixture containing cocaine, a controlled substance, included in Schedule II of the North Carolina Controlled Substance Act.

Id. at 334, 643 S.E.2d at 582.

¶ 36 Here, the indictments provide significant factual details beyond the charge alleged and provided the trial court with a "factual description of [D]efendant's particular alleged conduct." *Id.* at 337, 643 S.E.2d at 584. Defendant's indictment for felony larceny of a motor vehicle alleged:

> The jurors for the State upon their oath present that on or about [20 November 2017] and in [Burke County] [Defendant] unlawfully, willfully, and feloniously did steal, take and carry away a vehicle, a 2004 Toyota Tundra Truck, the personal property of Julie Cline and/or Timothy Cline, such property having a value in excess of One Thousand Dollars ($1,000.00). This act was in violation of N.C.G.S. § 14-72.

Further, Defendant's indictment for felony possession of a stolen motor vehicle alleged:

> The jurors for the State upon their oath present that on or about [20-21 November 2017] and in [Burke County] [Defendant] unlawfully, willfully, and feloniously did possess a vehicle, a 2011 White Chevy Silverado, the personal property of R.H. Barringer D/B/A Best of Beers, located at 1613 Main Avenue Drive NW, Hickory NC 28601, which was stolen property and which [Defendant] knew and had reason to believe had been stolen and unlawfully taken. This act was in violation of N.C.G.S. [§] 20-106.

¶ 37 Unlike the indictment in *Agnew*, the indictment for felony larceny of a motor vehicle here provided a "factual description of [D]efendant's particular alleged conduct." *Id.* The indictment went further than providing the charge alleged by providing the year, make, and model of the vehicle, a "2004 Toyota Tundra Truck." The indictment also provided the rightful owners' first and last names, "Julie Cline and/or Timothy Cline." This factual information goes beyond the generic language of the indictment in *Agnew* that simply alleged the charge to be indicted. *Id.* at 334, 643 S.E.2d at 582.

¶ 38 The indictment for felony possession of a stolen motor vehicle also provided a "factual description of [D]efendant's particular alleged conduct." *Id.* at 337, 643 S.E.2d at 584. The indictment went further than providing the charge alleged by providing the year, color, make, and model of the vehicle, a "2011 White Chevy Silverado." The indictment also provided the rightful owner's first and last name, "R.H. Barringer D/B/A Best of Beers." This factual information goes beyond the generic language of the indictment in *Agnew* that simply alleged the charge to be indicted. *Id.* at 334, 643 S.E.2d at 582.

¶ 39 The factual information contained in the indictments, coupled with the *Transcript of Plea*, contained enough information for an independent judicial determination of Defendant's actual guilt in this case, as required by N.C.G.S. § 15A-1022(c). The trial court did not err in accepting Defendant's *Alford* plea.

CONCLUSION

¶ 40 Defendant did not demonstrate he had a fair and just reason for withdrawing his *Alford* plea. Nor did the trial court err in accepting Defendant's *Alford* plea as there was sufficient information in the Record

to support an independent judicial determination of a factual basis for the plea in accordance with N.C.G.S. § 15A-1022(c). We affirm the trial court's order denying Defendant's motion to withdraw his *Alford* plea and the trial court's acceptance of Defendant's *Alford* plea.

AFFIRMED.

Judges TYSON and HAMPSON concur.

STATE OF NORTH CAROLINA
v.
SPANOLA SHUNDU GORDON, DEFENDANT

No. COA20-461

Filed 15 June 2021

1. Jury—question regarding unanimity—re-instruction—section 15A-1235

In a trial for sexual offenses, there was no plain error in the trial court's *Allen* charge, pursuant to N.C.G.S. § 15A-1235(a), in response to the jury's question on whether its decision needed to be unanimous. Where the jury's note did not indicate it was deadlocked but merely sought clarification, it was within the court's discretion to provide re-instruction on unanimity pursuant to subsection (a) without also giving the instructions contained in subsection (b).

2. Appeal and Error—satellite-based monitoring order—oral notice insufficient—writ of certiorari

Where defendant's oral notice of appeal from an order requiring him to enroll in lifetime satellite-based monitoring (SBM) was insufficient because the order was civil in nature, but defendant's petition for writ of certiorari showed merit, the Court of Appeals granted the petition to review the order. However, where defendant failed to raise a constitutional objection to the SBM order before the trial court, the Court of Appeals declined to invoke Appellate Rule 2 to review defendant's unpreserved constitutional arguments.

3. Satellite-Based Monitoring—effective assistance of counsel—statutory right—counsel's failure to object or raise constitutional issue

The trial court's order requiring defendant to enroll in lifetime satellite-based monitoring (SBM) was vacated where defendant received ineffective assistance of counsel pursuant to N.C.G.S. § 7A-451(a)(18) because his counsel's deficient performance—for failing to raise any objection to the imposition of SBM despite the State's lack of evidence on reasonableness under the Fourth Amendment, or to raise a constitutional argument, or to file a written notice of appeal from the order—caused prejudice to defendant.

Appeal by Defendant from judgments and order entered 23 January 2020 by Judge R. Stuart Albright in Davidson County Superior Court. Heard in the Court of Appeals 23 February 2021.

Attorney General Joshua H. Stein, by Assistant Attorney General Justin Isaac Eason, for the State-Appellee.

Sarah Holladay for Defendant-Appellant.

GORE, Judge.

¶ 1 Spanola Shundu Gordon ("Defendant") was sentenced to a total of 921 to 1204 months' imprisonment for one count of statutory sexual offense with a child by an adult and three counts of indecent liberties. The trial court ordered his enrollment in satellite-based monitoring ("SBM") for the remainder of his natural life. On appeal, Defendant argues that the trial court plainly erred in instructing the jury with an incomplete Allen charge. Also, Defendant argues that (1) the trial court erred when it ordered his lifetime SBM enrollment, and (2) his counsel rendered ineffective assistance by failing to challenge the trial court's SBM Order. We hold that the trial court did not plainly err in giving its instruction to the jury. In our discretion, we issue writ of certiorari to review the trial court's SBM order but decline to invoke Rule 2 to address Defendant's unpreserved constitutional challenge to lifetime SBM enrollment. While a constitutional ineffective assistance of counsel claim is unavailable on appeal, we find that Defendant received statutory ineffective assistance of counsel during the imposition of lifetime SBM. Accordingly, we find no error in part, dismiss in part, and vacate the SBM order without prejudice.

I. Factual and Procedural Background

¶ 2 On 22 January 2020, a jury found Defendant guilty of statutory sex offense with a child by an adult and three counts of indecent liberties. Defendant perpetrated these offenses in July 2016 on his then nine-year-

old daughter while she was visiting him for the weekend. On 23 January 2020, a jury found Defendant guilty of obtaining habitual felon status.

¶ 3 The jury began its deliberations at approximately 3:28 p.m. on 22 January 2020. At about 4:40 p.m., the jury sent out the following question:

> Clarification of Guilty- in order to be guilty vote must be UNANIMOUS? [I]f not unanimous then NOT GUILTY must be rendered?

The trial judge asked the State and defense counsel for suggestions as to how it should respond to the jury's question. Both parties concurred in requesting that the jury be reinstructed on the necessary charge for unanimity of verdict, and to further ask that the jury try to achieve a unanimous verdict. The trial judge responded to the jury as follows:

> [THE COURT]: It is your duty to find the facts and to render a verdict reflecting the truth. All twelve of you must agree to your verdict. You cannot reach a verdict by majority vote.

Neither party objected to this instruction.

¶ 4 After the jury was released, the trial court addressed the matters of sentencing and SBM. As to SBM, the State asserted that "the statute requires in this type of an offense," that Defendant be subject to lifetime monitoring. The State produced a STATIC-99 form prepared by Assessor Bart Leonard, who was not called to testify, which indicated that Defendant had an individual risk factor of "-1," placing him in level "II- Below Average Risk" for recidivism.

¶ 5 The trial court sentenced Defendant to a term of 483 to 640 months' imprisonment for statutory sex offense to run consecutively with three sentences of 146 to 188 months for indecent liberties. The trial court also ordered Defendant to register as a sex offender for 30 years and, upon release, submit to SBM for the remainder of his natural life. Defendant gave oral notice of appeal in open court.

II. Analysis

¶ 6 Defendant raises two issues on appeal. First, Defendant argues that the trial court plainly erred when it responded to the jury's question on unanimity with an incomplete instruction. Second, Defendant argues that the trial court erred in ordering him to submit to SBM for the remainder of his natural life. In the alternative, Defendant contends his trial counsel rendered ineffective assistance by failing to challenge the SBM Order.

A. Allen charge

¶ 7 **[1]** "The term 'Allen charge' is derived from the case of *Allen v. United States*, in which the United States Supreme Court approved the use of jury instructions that encouraged the jury to reach a verdict, if possible, after the jury requested additional instructions from the trial court." *State v. Gettys*, 219 N.C. App. 93, 101 n.1, 724 S.E.2d 579, 585 n.1 (2012) (citation omitted). North Carolina General Statutes Section 15A-1235 provides instructions a trial court may issue to a deadlocked jury.

¶ 8 Defendant argues that the trial court plainly erred when it responded to the jury's question with N.C. Gen. Stat. § 15A-1235(a), but omitted the instructions found in N.C. Gen. Stat. § 15A-1235(b). Defendant contends that because the jury was clearly unable to reach a unanimous verdict, the trial judge was required to fully instruct the jury as to both subsections (a) and (b) of the statute. However, we disagree that there was any indication the jury was deadlocked or having difficulty reaching unanimity. Thus, the specific requirements of § 15A-1235 were not invoked in this case.

¶ 9 "The decision *to give* an *Allen* charge is discretionary and therefore reviewed for abuse of discretion." *Gettys*, 219 N.C. App. at 101, 724 S.E.2d at 585-86 (citation omitted). "Whether the *Allen* charge provides the instructions required by N.C. Gen. Stat. § 15A-1235(b) is a question of law we review *de novo*." *Id.* at 101, 724 S.E.2d 586 (citation omitted). Because Defendant failed to object to the trial court's *Allen* instruction, he must establish that the alleged errors amounted to plain error. *Id.* at 101, 724 S.E.2d 586 (citation omitted). "Under the plain error standard of review, defendant has the burden of showing: (i) that a different result probably would have been reached but for the error or (ii) that the error was so fundamental as to result in a miscarriage of justice or denial of a fair trial." *State v. Wilson*, 203 N.C. App. 547, 551, 691 S.E.2d 734, 738 (2010) (citations and quotation marks omitted).

¶ 10 It is unnecessary to provide the precise language of N.C. Gen. Stat. § 15A-1235 here. However,

> [w]e note that the language of the statute is permissive rather than mandatory—a judge "may" give or repeat the instructions in N.C.G.S. § 15A-1235(a) and (b) if it appears to the judge that a jury is unable to agree. Furthermore, it has long been the rule in this State that in deciding whether a court's instructions force a verdict or merely serve as a catalyst for further deliberations, an appellate court must consider

> the circumstances under which the instructions were made and the probable impact of the instructions on the jury.

State v. Peek, 313 N.C. 266, 271, 328 S.E.2d 249, 253 (1985) (internal citations omitted).

¶ 11 Subsection (c) of the statute provides in pertinent part, "*If it appears to the judge that the jury has been unable to agree*, the judge may require the jury to continue its deliberations and may give or repeat the instructions provided in subsections (a) and (b)." N.C. Gen. Stat. § 15A-1235(c) (emphasis added). Here, the jury had been deliberating for approximately one hour and ten minutes before sending out a note requesting clarification from the trial judge. The note did not clearly indicate that the jury was deadlocked, suggest disagreement, or declare an impasse.

¶ 12 Instead, the plain text of the note states it is a request for "clarification." As this Court stated in *State v. Hunter*, "[w]e do not concede . . . that the legislature intended to require a trial judge, without regard to the circumstances then existing, to either recite G.S. 15A-1235(b) every time a jury returns to the courtroom without a verdict or discharge the jury." 48 N.C. App. 689, 692, 269 S.E.2d 736, 738 (1980). "[I]nstead, . . . the trial judge must be allowed to exercise his sound judgment to deal with the myriad different circumstances he encounters at trial." *Id.* at 692-93, 269 S.E.2d at 738 (internal citation omitted).

¶ 13 Absent the appearance of deadlock or impasse in the jury's deliberations, we find that the trial court did not err in reciting its instruction on unanimity pursuant to subsection (a) of N.C. Gen. Stat. § 15A-1235 without also providing the additional instructions of subsection (b).

B. Satellite-Based Monitoring

¶ 14 **[2]** Defendant next argues that the trial court erred in ordering him to submit to SBM for the remainder of his natural life. However, Defendant concedes that oral notice of appeal was insufficient to preserve this issue for appellate review, and he was required to provide written notice of appeal from the order imposing lifetime SBM. "Our Court has held that SBM hearings and proceedings are not criminal actions, but are instead a civil regulatory scheme." *State v. Brooks*, 204 N.C. App. 193, 194, 693 S.E.2d 204, 206 (2010) (*purgandum*). Accordingly, "oral notice pursuant to N.C. R. App. P. 4(a)(1) is insufficient to confer jurisdiction on this Court. Instead, a defendant must give notice of appeal pursuant to N.C. R. App. P. 3(a) as is proper "in a civil action or special proceeding[.]"

Id. at 194-95, 693 S.E.2d at 206 (quoting N.C. R. App. P. 3(a)). Rule 3 provides that

> [a]ny party entitled by law to appeal from a judgment or order of a superior or district court rendered in a civil action or special proceeding may take appeal *by filing notice of appeal* with the clerk of superior court and serving copies thereof upon all other parties within the time prescribed by subsection (c) of this rule.

N.C. R. App. P. 3(a) (emphasis added).

¶ 15 Defendant petitions this Court to issue writ of certiorari as to permit review of the trial court's SBM order. "The writ of certiorari may be issued in appropriate circumstances by either appellate court to permit review of the judgments and orders of trial tribunals when the right to prosecute an appeal has been lost by failure to take timely action[.]" N.C. R. App. P. Rule 21(a). However, "[a] writ of certiorari is not intended as a substitute for a notice of appeal. If this Court routinely allowed a writ of certiorari in every case in which the appellant failed to properly appeal, it would render meaningless the rules governing the time and manner of noticing appeals." *State v. Bishop*, 255 N.C. App. 767, 769, 805 S.E.2d 367, 369 (2017). "A petition for the writ must show merit or that error was probably committed below." *State v. Grundler*, 251 N.C. 177, 189, 111 S.E.2d 1, 9 (1959) (citation omitted). We find that Defendant has shown merit on his claim. In our discretion, we issue writ of certiorari to permit review of the trial court's SBM order.

¶ 16 Defendant argues that the trial court erred in ordering lifetime SBM because the State failed to present any evidence that SBM is a reasonable search under the Fourth Amendment. Specifically, Defendant contends that the trial court mistakenly concluded that SBM was required by statute as applied to his convictions for statutory sex offense with a child and three counts of indecent liberties.

¶ 17 There was no separate hearing held on this matter. Rather, the SBM discussion was incorporated into the sentencing proceeding. During that proceeding, Defendant made no constitutional objection to the SBM order on grounds that it constituted an unreasonable search. Having failed to preserve a Fourth Amendment challenge to the SBM enrollment order, Defendant asks this Court to take the extraordinary measure of invoking Rule 2 to reach the merits of his unpreserved constitutional argument.

> As our Supreme Court has instructed, we must be cautious in our use of Rule 2 not only because it is an extraordinary remedy intended solely to prevent manifest injustice, but also because "inconsistent application" of Rule 2 itself leads to injustice when some similarly situated litigants are permitted to benefit from it but others are not.

Bishop, 255 N.C. App. at 770, 805 S.E.2d at 370 (citation omitted).

¶ 18 Here, Defendant did not comply with the procedure necessary to preserve his SBM issue on appeal and has not demonstrated how his failure to object to SBM enrollment at trial "resulted in a fundamental error or manifest injustice[ ]" that necessitates this Court's invocation of Rule 2. *State v. Cozart*, 260 N.C. App. 96, 101, 817 S.E.2d 599, 603 (2018). In our discretion, we decline to invoke Rule 2 and dismiss Defendant's unpreserved SBM argument on appeal.

C. Ineffective Assistance of Counsel

¶ 19 **[3]** Alternatively, Defendant asserts a constitutional claim for ineffective assistance of counsel due to his attorney's failure to hold the State to its burden of proving his constitutional eligibility for lifetime SBM. However, SBM is a civil regulatory scheme, and this Court has previously held that a claim for ineffective assistance of counsel based on Defendant's Sixth Amendment right is not available when challenging an SBM order. *See State v. Wagoner*, 199 N.C. App. 321, 332, 683 S.E.2d 391, 400 (2009) (finding that "a claim for ineffective assistance of counsel is available only in criminal matters, and we have already concluded that SBM is not a criminal punishment."). "As a result, since an SBM proceeding is not criminal in nature, defendants required to enroll in SBM are not entitled to challenge the effectiveness of the representation that they received from their trial counsel based on the right to counsel provisions of the federal and state constitutions." *State v. Clark*, 211 N.C. App. 60, 77, 714 S.E.2d 754, 765 (2011) (citation omitted). Accordingly, Defendant's constitutional challenge to lifetime SBM enrollment based on ineffective assistance of counsel is unavailable on appeal, and his argument is without merit.

¶ 20 However, Defendant also argues that he has a statutory right to counsel in an SBM proceeding pursuant to N.C. Gen. Stat. § 7A-451(a)(18), which provides that "[a]n indigent person is entitled to services of counsel in the following actions and proceedings . . . [in] [a] proceeding involving placement into satellite monitoring[.]" N.C. Gen. Stat. § 7A-451(a)(18) (2020). "This Court has also recognized that, where

a statutory right to counsel exists, that right includes the right to effective assistance of counsel as set forth in *Strickland*[.]" *State v. Velasquez-Cardenas*, 259 N.C. App. 211, 223, 815 S.E.2d 9, 17 (2018).

¶ 21 This Court has previously addressed the statutory right to effective assistance of counsel as applied to a termination proceeding.

> The parents' right to counsel in a proceeding to terminate parental rights is now guaranteed in all cases by statute. A parent's interest in the accuracy and justice of the decision to terminate his or her parental rights is a commanding one. By providing a statutory right to counsel in termination proceedings, our legislature has recognized that this interest must be safeguarded by adequate legal representation. If no remedy is provided for inadequate representation, the statutory right to counsel will become an "empty formality." Therefore, the right to counsel provided by [statute] includes the right to effective assistance of counsel.

In re Bishop, 92 N.C. App. 662, 664-65, 375 S.E.2d 676, 678 (1989) (internal citations omitted). Defendant contends, and we agree, that this analysis applies to SBM equally as well as it does to the termination of parental rights, juvenile delinquency, or the revocation of probation or parole.

¶ 22 "When a convicted defendant complains of the ineffectiveness of counsel's assistance, the defendant must show that counsel's representation fell below an objective standard of reasonableness." *Strickland v. Washington*, 466 U.S. 668, 687-88, 80 L. Ed. 2d 674, 693 (1984). As this Court recently discussed in *State v. Spinks*, we evaluate Defendant's statutory ineffective assistance of counsel claim using a two-pronged standard as articulated in *Strickland v. Washington*, 466 U.S. 668, 80 L. Ed. 2d 674, (1984) *and State v. Braswell*, 312 N.C. 553, 324 S.E.2d 241 (1985). 2021-NCCOA-218.

> [T]o assert a statutory ineffective assistance of counsel claim on appeal from the imposition of satellite-based monitoring, a defendant must show "that counsel's performance was deficient and that this deficiency was so serious as to deprive the party of a fair hearing." In determining whether counsel's performance was deficient, we accord great deference to matters of strategy, and we "evaluate the conduct from counsel's perspective at the time[.]"

> To demonstrate prejudice, the defendant must establish "a reasonable probability that, but for counsel's errors, there would have been a different result in the proceedings."

Id. at ¶61 (internal citations omitted).

¶ 23 In this case, as in *Spinks*, trial counsel for Defendant failed to object to the imposition of lifetime SBM enrollment, did not raise a constitutional objection, and failed to file written notice of appeal from the SBM order. *See id.* at ¶62. The State speculates that, "It may have been a strategy or even the express wishes of Defendant for counsel to remain quiet at the sentencing phase, including with respect to SBM." However, it is entirely unclear what strategic purpose would be served by failing to object to SBM enrollment during the sentencing proceeding or not filing written notice of appeal from the SBM order. Further, there is no discernable strategic reason that Defendant wished for his counsel to remain quiet and not hold the State to its burden of establishing reasonableness under the Fourth Amendment.

¶ 24 However, "[t]he fact that counsel made an error, even an unreasonable error, does not warrant reversal of a conviction unless there is a reasonable probability that, but for counsel's errors, there would have been a different result in the proceedings." *Braswell*, 312 N.C. at 563, 324 S.E.2d at 248 (citation omitted). Here, the trial court made its SBM determination during the sentencing proceeding and did not conduct a separate hearing on reasonableness of lifetime SBM enrollment. While Defendant was convicted of Statutory Sexual Offense with a Child by an Adult pursuant to N.C. Gen. Stat. § 14-27.28, and under N.C. Gen. Stat. § 14-208.40A(c), [i]f the court finds that the offender has been . . . convicted of G.S. 14-27.28, the court shall order the offender to enroll in a satellite-based monitoring program for life[,]" § 14-208.40A(a)-(c) (2020), "the trial court must conduct a hearing in order to determine the constitutionality of ordering the targeted individual to enroll in the [SBM] program[.]" *State v. Ricks*, 271 N.C. App. 348, 362, 843 S.E.2d 652, 664 (2020) (citation omitted). Here, trial counsel for Defendant failed to raise any objection to the imposition of lifetime SBM enrollment when the State presented no evidence regarding reasonableness under the Fourth Amendment, and Defendant was prejudiced as a result. Accordingly, we find that Defendant received statutory ineffective assistance of counsel and vacate the imposition of lifetime SBM enrollment without prejudice to the State's ability to conduct further SBM proceedings.

III. Conclusion

¶ 25 We find that the trial court did not err by reinstructing the jury in accordance with N.C. Gen. Stat. § 15A-1235(a) on unanimity of verdict while omitting the additional instructions of N.C. Gen. Stat. § 15A-1235(b) because there was no indication that the jury was deadlocked. In our discretion, we issue writ of certiorari but decline to invoke Rule 2 to review Defendant's unpreserved constitutional challenge to lifetime SBM enrollment. While Defendant's claim for constitutional ineffective assistance of counsel regarding the trial court's SBM Order is not available on appeal, we hold that Defendant received statutory ineffective assistance of counsel. We vacate the imposition of SBM without prejudice to the State's ability to file a subsequent SBM application.

NO ERROR IN PART; DISMISSED IN PART; VACATED IN PART.

Judges ARROWOOD and COLLINS concur.

STATE OF NORTH CAROLINA
v.
LORI JEAN WARD

No. COA20-552

Filed 15 June 2021

Probation and Parole—subject matter jurisdiction—statutory conditions—multiple counties

The trial court in Watauga County lacked subject matter jurisdiction pursuant to N.C.G.S. § 15A-1344 to revoke defendant's probation in two cases where defendant's probation sentences were not imposed in Watauga County, defendant's probation violations did not occur in Watauga County, and defendant did not reside in Watauga County. The State's argument, that the administrative assignment of the two cases to a probation officer in Watauga County caused defendant's violations for absconding to occur in Watauga County, was rejected.

Appeal by Defendant from Judgments entered 3 March 2020 by Judge Gary M. Gavenus in Watauga County Superior Court. Heard in the Court of Appeals 24 March 2021.

Attorney General Joshua H. Stein, by Assistant Attorney General Nathan D. Childs, for the State.

Blass Law, PLLC, by Danielle Blass, for defendant-appellant.

HAMPSON, Judge.

Factual and Procedural Background

¶ 1 Lori Jean Ward (Defendant) appeals from Judgments and Commitments Upon Revocation of Probation entered in Watauga County Superior Court revoking her probation and activating sentences arising from two separate criminal cases: one from Lincoln County and one from Catawba County. The Record tends to show the following:

¶ 2 On 29 October 2019, Watauga County Probation Officer Scottie Maltba (Officer Maltba) swore out two Probation Violation Reports against Defendant. Both reports were filed in Watauga County Superior Court on 1 November 2019. The first report, filed in Watauga County file number 19 CRS 633, alleged Defendant had violated terms of a probationary sentence imposed in Lincoln County (the Lincoln County Case) by absconding from probation after being released from custody in Catawba County on 18 September 2019. The second report filed in Watauga County file number 19 CRS 634 alleged Defendant had violated terms of a probationary sentence imposed in Catawba County (the Catawba County Case) by absconding from probation after being released from custody in Catawba County on 18 September 2019. Both Reports reflect Defendant was located in Hickory, North Carolina at the time of the alleged violations.

¶ 3 On 4 February 2020, Defendant, through trial counsel, filed a written Motion to Dismiss alleging the trial court in Watauga County lacked jurisdiction under N.C. Gen. Stat. § 15A-1344 to revoke Defendant's probation in both cases because Defendant was not a resident of Watauga County or the Judicial District in which Watauga County is located, probation had not been imposed in either case in Watauga County or its Judicial District, and Defendant was not alleged to have violated probation in Watauga County or its Judicial District. The matter came on for hearing in Watauga County Superior Court on 10 March 2020. The trial court first heard Defendant's Motion to Dismiss on jurisdictional grounds and then proceeded to hear evidence on the merits of the violation reports. Officer Maltba was the only witness to testify. He testified both during the preliminary hearing of the Motion to Dismiss and the hearing on Defendant's alleged probation violations.

¶ 4 Officer Maltba's testimony over the course of the two phases establishes that on 14 June 2019, Defendant was convicted, in a case unrelated to this appeal, of Misdemeanor Larceny in Watauga County and placed on probation (the Watauga County Case). The same day, Defendant submitted a request to the Judicial Services Coordinator, who conducted the probation intake, that her probation be supervised in Catawba County. At the time, Defendant was in custody—it appears in Catawba County[1]—awaiting trial on the pending charges in the Catawba and Lincoln County Cases. Defendant informed the Judicial Services Coordinator that, after being released from custody, Defendant intended to live in Catawba County at the Salvation Army Center, which served as a homeless shelter. Defendant further advised she eventually intended to live with her sister in Newton, Catawba County and provided her mother's phone number as contact information. The Judicial Services Coordinator provided Defendant reporting instructions for Catawba County and told Defendant to report to the Catawba County probation office within three days pending her release from custody.

¶ 5 On 25 June 2019, unbeknownst at the time to Defendant, the Chief Probation Officer in Catawba County provided a narrative report declining to accept supervision of Defendant's probation in the Watauga County Case on the basis the address Defendant provided was not a valid living address because it was a "homeless address" and that Defendant presently remained in custody. Consequently, Officer Maltba, in Watauga County, was assigned to monitor Defendant's probation in the Watauga County Case. Officer Maltba did not meet with Defendant but testified he simply monitored where Defendant was because she remained in custody.

¶ 6 Subsequently, on 10 July 2019, Defendant entered a plea arrangement in the Lincoln County Case. Defendant agreed to plead guilty to one count of Felony Possession of Heroin. In exchange, the State agreed to dismiss a second charge of Possession of Drug Paraphernalia. The written plea arrangement further stated: "Defendant's probation shall be transferred to Catawba County + she shall comply with drug treatment court." The trial court in Lincoln County accepted the plea and ordered it recorded. The same day, the Lincoln County trial court entered Judgment sentencing Defendant to a term of five-to-fifteen months imprisonment suspended upon completion of fifteen months of probation with the ad-

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1. The record is not expressly clear as to where Defendant was in custody at this time, but it is a fair inference from the Record custody was in Catawba County. The State, without record support, asserts Defendant was in custody in Watauga County. Defendant claims she was in custody in Catawba County at the time.

ditional special probation requirement Defendant serve fifty days in custody. The Judgment in the Lincoln County Case further provided as a special condition of probation: "[m]ay transfer to CATAWBA County for supervision." According to Officer Maltba's testimony, a narrative report from Lincoln County dated 11 July 2019 indicated the Lincoln County Judicial Service Coordinator (Lincoln County JSC) informed Defendant of the conditions of supervised probation and instructed Defendant to contact the Lincoln County JSC within one day of Defendant's release from custody. The narrative report further noted Defendant was currently on probation with Officer Maltba in Watauga County.

¶ 7 Then, on 19 July 2019, Defendant entered an *Alford* plea to one count of Felony Larceny and one count of Misdemeanor Larceny in the Catawba County Case. In exchange for the *Alford* plea, the State agreed to consolidate the charges and that Defendant would receive an intermediate sentence in the presumptive range. The trial court in Catawba County accepted the plea and ordered it recorded. The same day, the Catawba County trial court entered Judgment sentencing Defendant to a term of ten-to-twenty-one months imprisonment, suspended upon completion of twenty-four months of supervised probation, with the Special Probation requirement consistent with an intermediate punishment Defendant serve an active term of sixty days in custody of the Catawba County Sheriff. Also on 19 July 2019, a Catawba County Probation Officer conducted an intake interview with Defendant. According to Officer Maltba, the narrative report entered by that Catawba County Probation Officer stated "[D]efendant advised him that she was going to live at the Salvation Army and maybe Black Mountain." Defendant also apparently advised the Catawba County Probation Officer her probation in the Watauga County Case was supposed to be transferred to Catawba County. It was only then Defendant was informed the transmittal of her probation to Catawba County had been denied, and the Catawba County Probation Officer "advised her to call [Officer] Maltba in Watauga County upon her release."

¶ 8 On 4 August 2019, Defendant was released from custody. On 30 September 2019, Officer Maltba conducted a "records check" on Defendant, which showed Defendant had been charged with a new crime in Catawba County on 18 September 2019 and been released on bond the same day. Having not heard from Defendant, Officer Maltba "began to investigate as to why . . . [D]efendant hadn't reported."

¶ 9 Having failed to locate Defendant, Officer Maltba filed the two Probation Violation Reports, dated 1 November 2019, in Watauga County Superior Court, alleging Defendant had absconded and failed to report

as directed in her Lincoln and Catawba County cases. On the Record before us, there is no report Defendant violated probation in the Watauga County Case. Officer Maltba testified Defendant was "picked up" on 17 December 2019 in Catawba County, and on 30 December 2019 she was transferred to Watauga County, where Officer Maltba served her with the Probation Violation Reports; this was the first time Officer Maltba met with Defendant in-person since being assigned to her six months prior.

¶ 10 At the hearing on Defendant's Motion to Dismiss, Officer Maltba testified policies issued by the North Carolina Department of Public Safety required, when a probationer is on probation in one county, that any subsequent probationary sentence entered in another county be assigned to be supervised by the same probation officer in the first county as a "subsequent case." Thus, here, Officer Maltba explained he was automatically assigned to supervise Defendant's probation in the Lincoln and Catawba County Cases because he was already supervising probation in the Watauga County Case. Officer Maltba, however, also testified the same policies required:

> Offenders must be supervised in the county of residence. If at the time the sentencing offender resides in a county other than the county of conviction, the case must be, upon completion of a[n] intake interview, be transmitted to that county of residence. The county of residence must accept the case unless it shows that the offender does not live there and that the intake officer will give the defendant reporting instructions to the Chief Probation and Parole Officer of the county of residence within three calendar days.

Officer Maltba conceded there was no evidence Defendant resided in Watauga County. Indeed, the Record, including charging documents in both the Lincoln and Catawba County Cases, the two Probation Violation Reports, and an Affidavit of Indigency filed by Defendant prior to hearing, reflects the only actual addresses, locations, or places of residence given for Defendant were in Catawba County.

¶ 11 At the conclusion of the hearing on the Motion to Dismiss, the trial court denied Defendant's motion on the basis: "her probation violations, as alleged in the violation report, occurred in Watauga County because she absconded by making her whereabouts unknown to this probation officer and avoided supervision of this probation officer in Watauga County." The trial court proceeded to arraign Defendant on the probation violations and heard further testimony from Officer Maltba

on Defendant's alleged absconding from probation. At the conclusion of the hearing, Defendant, through counsel, renewed her jurisdictional objection and further moved to dismiss on the basis the State had failed to produce sufficient evidence of probation violations to support revocation of probation. The trial court denied these motions, found Defendant in violation of her probation in both the Lincoln County Case and Catawba County Case, revoked probation in both cases, and activated both sentences with the sentence in the Catawba County Case (19 CRS 634) to run consecutively after the sentence in the Lincoln County Case (19 CRS 633). The trial court entered written Judgments the same day: 10 March 2020. Defendant timely filed written Notice of Appeal on 17 March 2020.

Issue

¶ 12 The dispositive issue on appeal is whether Defendant's alleged probation violations in the Lincoln County Case and Catawba County Case occurred in Watauga County for purposes of establishing the Watauga County trial court's jurisdiction to revoke Defendant's probation in both cases pursuant to N.C. Gen. Stat. § 15A-1344(a).

Standard of Review

> "[T]he issue of a court's jurisdiction over a matter may be raised at any time, even for the first time on appeal or by a court *sua sponte*." "It is well settled that a court's jurisdiction to review a probationer's compliance with the terms of his probation is limited by statute." "[A]n appellate court necessarily conducts a statutory analysis when analyzing whether a trial court has subject matter jurisdiction in a probation revocation hearing, and thus conducts a *de novo* review." "Under a *de novo* review, the court considers the matter anew and freely substitutes its own judgment for that of the lower tribunal."

State v. Tincher, 266 N.C. App. 393, 395, 831 S.E.2d 859, 861-62 (2019) (alterations in original) (citations omitted).

¶ 13 "The State bears the burden in criminal matters of demonstrating beyond a reasonable doubt that a trial court has subject matter jurisdiction." *State v. Williams*, 230 N.C. App. 590, 595, 754 S.E.2d 826, 829 (2013) (lack of jurisdiction to revoke probation). " 'When the record shows a lack of jurisdiction in the lower court, the appropriate action on the part of the appellate court is to arrest judgment or vacate any order

entered without authority.' " *Id.* (quoting *State v. Felmet*, 302 N.C. 173, 176, 273 S.E.2d 708, 711 (1981)).

Analysis

¶ 14 N.C. Gen. Stat. § 15A-1344 governs the authority of trial courts to alter or revoke probation in response to violations. N.C. Gen. Stat. § 15A-1344 (2019). Relevant to this case, Section 15A-1344(a) provides:

> probation may be reduced, terminated, continued, extended, modified, or *revoked* by any judge entitled to sit in the court which imposed probation and who is resident or presiding in the district court district as defined in G.S. 7A-133 or superior court district or set of districts as defined in G.S. 7A-41.1, as the case may be, *where the sentence of probation was imposed*, *where the probationer violates probation*, *or where the probationer resides*.

N.C. Gen. Stat. § 15A-1344(a) (2019) (emphasis added). Here, Defendant contends the trial court erred in denying her Motion to Dismiss for lack of subject-matter jurisdiction, arguing the State presented insufficient evidence to establish: Defendant's probation in the Lincoln and Catawba County Cases was imposed in Watauga County; Defendant violated probation in the Lincoln and Catawba County Cases in Watauga County; or Defendant resided in Watauga County. The State effectively concedes the evidence does not support a determination probation in the Lincoln County Case or the Catawba County Case was imposed in Watauga County and, further, that there is no evidence Defendant was a resident of Watauga County. In addition, there is no argument Watauga County is in the same judicial district or set of districts as either Lincoln or Catawba Counties.[2] Rather, consistent with the trial court's ruling, the State solely argues Defendant violated the terms of her probation in the Lincoln and Catawba County Cases in Watauga County because those cases had been administratively assigned to Officer Maltba for supervision in Watauga County; thus, the State contends Defendant's failure to report to Officer Maltba for supervision in Watauga County constituted absconding from probation in Watauga County.

The Lincoln County Case

¶ 15 As an initial matter, Officer Maltba's Probation Violation Report filed in the Lincoln County Case (19 CRS 633) does not expressly allege

2. Catawba County is in District 25B. Lincoln County is in District 27B. Watauga County is in District 24. N.C. Gen. Stat. § 7A-41(a) (2019).

Defendant absconded from probation in Watauga County. Moreover, the terms of Defendant's plea arrangement in the Lincoln County Case specifically included: "Defendant's probation shall be transferred to Catawba County . . . ." The State, however, contends because the Judgment entered by the Lincoln County trial court includes as a special condition that probation "[m]ay transfer to CATAWBA County for supervision[,]" it converted the plea arrangement such that any transfer became a "permissive" term of the plea arrangement and the State was not required to transfer Defendant's probation in the Lincoln County Case to Catawba County. Thus, the State essentially posits, it was not required to abide by its own representation to a Superior Court Judge of an express term in a written plea arrangement with Defendant that was accepted by that Superior Court Judge.

¶ 16 "A plea agreement is treated as contractual in nature, and the parties are bound by its terms." *State v. Russell*, 153 N.C. App. 508, 509, 570 S.E.2d 245, 247 (2002) (citation omitted). "Normally, plea agreements are in the form of unilateral contracts and the 'consideration given for the prosecutor's promise is not defendant's corresponding promise to plead guilty, but rather is defendant's actual performance by so pleading.' " *State v. King*, 218 N.C. App. 384, 388, 721 S.E.2d 327, 330 (2012) (quoting *State v. Collins*, 300 N.C. 142, 149, 265 S.E.2d 172, 176 (1980)). "Once defendant begins performance of the contract 'by pleading guilty or takes other action constituting detrimental reliance upon the agreement[,]' the prosecutor can no longer rescind his offer." *Id.* (alteration in original) (quoting *Collins*, 300 N.C. at 149, 265 S.E.2d at 176). "Due process requires strict adherence to a plea agreement and 'this strict adherence requires holding the State to a greater degree of responsibility than the defendant . . . for imprecisions or ambiguities in plea agreements.' " *Id.* (alteration in original) (quoting *State v. Blackwell*, 135 N.C. App. 729, 731, 522 S.E.2d 313, 315 (1999)).

¶ 17 Here, once Defendant entered her guilty plea in the Lincoln County Case, the State was bound by the unambiguous terms of its plea arrangement with Defendant to transfer the probationary aspect of Defendant's split sentence to Catawba County. *See id.* Indeed, the trial court's statement in the actual Judgment that probation "[m]ay transfer to CATAWBA County for supervision" cannot, in this context, reasonably be construed as granting the State unilateral authority to decide whether to transfer supervision to Catawba County. *See id.* Rather, in light of the plea arrangement in the Lincoln County Case, the trial court's use of the term "may" can only be construed as a grant of authority or judicial authorization to the State for purposes of implementing the mandatory provision

of the plea agreement to transfer Defendant's probation in the Lincoln County Case to Catawba County. *Cf. Jones v. Madison Cnty. Comm'rs*, 137 N.C. 579, 591 50 S.E. 291, 295 (1905) (citing Black, Henry Campbell, *Handbook on the Construction and Interpretation of the Laws*, West Publishing Co. (1896)) (recognizing use of generally permissive terms in a statute "will be construed as mandatory, and the execution of the power may be insisted upon as a duty" where it "provides for the doing of some act which is required by justice or public duty, as where it invests a public body, municipality, or officer with power and authority to take some action which concerns the public interests or the rights of individuals" and referencing cases "in which the term 'may' and 'authorized and empowered' and 'authorized' are respectively held to be imperative").

¶ 18 The State also argues the plea arrangement in the Lincoln County Case could not impose a condition of probation changing statutory venue for Defendant's probation. The State, however, fails to offer any support for its assertion, let alone identify any particular statute. Moreover, N.C. Gen. Stat. § 15A-1343(a) provides: "The court may impose conditions of probation reasonably necessary to insure that the defendant will lead a law-abiding life or to assist him to do so." N.C. Gen. Stat. § 15A-1343(a) (2019); *see also* § 15A-1343(b)(2-3) ("As regular conditions of probation, a defendant must: . . . Remain within the jurisdiction of the court unless granted written permission to leave by the court or his probation officer. Report as directed by the court or his probation officer . . . ."). Indeed, the statute further provides the following:

> Regular conditions of probation apply to each defendant placed on supervised probation *unless the presiding judge specifically exempts the defendant from one or more of the conditions in open court and in the judgment of the court*. It is not necessary for the presiding judge to state each regular condition of probation in open court, but the conditions must be set forth in the judgment of the court.

§ 15A-1343 (emphasis added).

¶ 19 In any event, even if the provision of the plea arrangement was not enforceable, the State has failed to offer any legal basis for probation to be supervised in Watauga County for a probationary sentence imposed in Lincoln County in the absence of evidence Defendant was resident in Watauga County or even located in Watauga County when she allegedly absconded. Thus, the State failed to meet its burden to show Defendant

was properly being supervised on probation in Watauga County resulting from the Lincoln County Case such that any absconding from probation occurred in Watauga County. Therefore, the trial court lacked jurisdiction to revoke Defendant's probation in Watauga County. Consequently, we vacate the trial court's Judgment revoking Defendant's probation in the Lincoln County Case (Watauga County file number 19 CRS 633).

The Catawba County Case

¶ 20 Defendant further contends the Watauga County trial court erred in determining it had jurisdiction to revoke probation for the Catawba County Case on the basis Defendant absconded from probation in Watauga County. Specifically, Defendant argues the State's own evidence showed Department of Public Safety policies required probation to be supervised in the county of the probationer's residence and Officer Maltba conceded in his testimony there was no evidence Defendant resided in Watauga County. Again, there is no express allegation in the violation report filed with respect to the Catawba County Case that Defendant absconded from probation in Watauga County. Further, the materials in the Record have a tendency to reflect Defendant was, in fact, resident in Catawba County at all times relevant to this appeal.

¶ 21 The State, nevertheless, contends this case is analogous to our decision in *State v. Regan*, 253 N.C. App. 351, 800 S.E.2d 436 (2017), *overruled on other grounds by State v. Morgan*, 372 N.C. 609, 831 S.E.2d 254 (2019), in that Defendant was on probationary sentences originating from multiple jurisdictions and Officer Maltba was simply trying to coordinate the three different probationary sentences in Watauga County. *Regan* is, however, inapposite.

¶ 22 In *Regan*, the defendant was put on probation in Harnett County. *Id.* at 352, 800 S.E.2d at 437. Subsequently, the defendant was placed on probation for a conviction in Sampson County. *Id.* The Sampson County probation was assigned to the same Harnett County probation officer. *Id.* The defendant absconded and her probation was subsequently revoked by a Harnett County Superior Court. *Id.* at 353, 800 S.E.2d at 438. On appeal, the defendant "argue[d] that the trial court in Harnett County lacked subject matter jurisdiction to commence a probation revocation hearing because the probation originated in Sampson County." *Id.* at 352, 800 S.E.2d at 437. Specifically, the defendant claimed:

> the State did not meet its burden of showing that 1) the Sampson County probation was transferred to Harnett County Superior Court and the Harnett County Superior Court thereafter issued its own

> probation order authorizing supervision of Defendant; 2) Defendant violated her probation in Harnett County; or 3) Defendant resided in Harnett County at the time of the violations.

Id. at 355, 800 S.E.2d at 438-39. However, this Court concluded:

> Defendant's argument [wa]s refuted by evidence that at the time she violated her probation by failing to pay supervision fees and by leaving the state, her residence was in Harnett County. Defendant's argument also [wa]s refuted by evidence that she violated her probation by failing to report for an appointment with her probation officer in Harnett County, thus vesting Harnett County Superior Court with jurisdiction to revoke Defendant's probation.

Id. at 355, 800 S.E.2d at 439. Our Court further pointed out:

> the trial court also could have found as a fact, based on a reasonable inference from the evidence, that Defendant violated the terms of her probation in Harnett County when she failed to meet with Officer Wiley on 5 April 2011 . . . . By failing to appear for her appointment with Officer Wiley of the Harnett County Probation Office, Defendant committed a probation violation in Harnett County.

Id.

¶ 23 Thus, in that case, Defendant was a resident of Harnett County and absconded from Harnett County, including failing to keep appointments in Harnett County. *See id.* Here, however, there is, again, no evidence Defendant was a resident of Watauga County and no evidence Defendant, in fact, absconded from Watauga County or missed any scheduled appointments in Watauga County. Indeed, here, unlike in *Regan*, there never was any supervisory contact between Defendant and Officer Maltba in Watauga County—in fact, Officer Maltba would not meet Defendant until presenting her with the probation violations reports in December 2019.

¶ 24 The State argues Defendant was informed during the intake processes for both the Lincoln and Catawba County Cases she was being supervised on probation in Watauga County—and, thus, was required to report to Officer Maltba upon her release from custody in Catawba County. However, Officer Maltba's testimony actually only reflects

that the narrative summary from Lincoln County stated the Lincoln County JSC told Defendant she was still on probation in the Watauga County Case.[3] Similarly, the narrative summary from the Catawba County Probation Officer reflects Defendant was simply told her request to transfer probation in the Watauga County Case to Catawba County had been denied and she should contact Officer Maltba once she was released from custody in Catawba County. Again, however, and unlike *Regan*, Defendant was never alleged to be in violation of her probation in the Watauga County Case by failing to report to Officer Maltba.

¶ 25 As with the Lincoln County Case, the State has failed to provide any basis for asserting Defendant's probation in the Catawba County Case was properly supervised in Watauga County. This is particularly so where the State's own evidence revealed Department of Public Safety Policy required the probationer to be supervised in the county of her residence, there was no evidence Defendant resided in Watauga County, and every indication in the Record is that Defendant resided in Catawba County. Thus, the State failed to meet its burden to show Defendant was properly being supervised on probation in Watauga County resulting from the Catawba County Case such that any absconding from probation occurred in Watauga County. Therefore, the trial court lacked jurisdiction to revoke Defendant's probation in Watauga County. Consequently, we vacate the trial court's Judgment revoking Defendant's probation in the Catawba County Case (Watauga County file number 19 CRS 634).

Conclusion

¶ 26 Accordingly, for the foregoing reasons, we vacate the trial court's Judgments revoking Defendant's probation in both Watauga County file numbers 19 CRS 633 and 19 CRS 634.

VACATED.

Judges ARROWOOD and CARPENTER concur.

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3. Officer Maltba speculated in his testimony that the Lincoln County JSC's instruction to Defendant to contact her within a day of Defendant's release was for the purpose of providing Defendant with Officer Maltba's contact information. This does not appear on the face of Officer Maltba's recitation of the narrative report and would be in conflict with the express terms of Defendant's plea agreement.

WARREN COUNTY DEPARTMENT OF SOCIAL SERVICES, ON BEHALF OF ERICKA GLENN, PLAINTIFF

v.

ANTHONY J. GARRELTS, DEFENDANT

No. COA20-868

Filed 15 June 2021

Paternity—child support claim—sperm donor—definition of "parent"—choice of law—lex loci test

In a case of first impression involving a child support claim brought against a sperm donor (defendant), where the issue was whether defendant qualified as the "parent" of a child conceived via artificial insemination, the Court of Appeals applied the lex loci test when deciding that the paternity laws of the state where the artificial insemination, conception, pregnancy, and birth occurred (Virginia) governed the action rather than the laws of the state where the action was filed (North Carolina). Therefore, the trial court's order requiring defendant to pay child support pursuant to North Carolina law—which provides that sperm donors legally qualify as parents—was reversed and remanded for a new proceeding applying Virginia law, which does not include sperm donors in the legal definition of a "parent."

Appeal by Defendant from an order entered on 10 July 2020 by Judge Adam S. Keith in Warren County District Court. Heard in the Court of Appeals 28 April 2021.

Banzet, Thompson, Styers, & May, PLLC, by Mitchell G. Styers and Jill A. Neville, for Defendant-Appellant.

No brief for Plaintiff-Appellee.

JACKSON, Judge.

¶ 1 This case presents a novel choice-of-law issue as between the artificial insemination laws of North Carolina and those of Virginia. In order to determine whether a sperm donor qualifies as the "parent" of a minor child conceived via artificial insemination, we must decide whether to apply the paternity laws of the state where the insemination and birth occurred (here, Virginia), or alternatively the laws of the state where the paternity action was initiated (here, North Carolina). Because our traditional choice of law principles direct us to apply the law of the situs

of the claim, we conclude that this action should be governed by the substantive laws of Virginia. We accordingly reverse and remand for further proceedings consistent with this opinion.

I. Factual and Procedural Background

¶ 2 Plaintiff Ericka Glenn met and befriended Defendant Anthony Garrelts in 2010 in Virginia. Ms. Glenn and her partner wanted to conceive a child together, and they asked Defendant to serve as a sperm donor in order to artificially inseminate Ms. Glenn. Defendant agreed, and the parties entered into a "verbal contract" to solidify their understanding. The artificial insemination and conception[1] occurred in Virginia, and Ms. Glenn continued to live in Virginia throughout her pregnancy. The child was born in December 2011, and Ms. Glenn was the only parent who was listed on the birth certificate.

¶ 3 In late 2012, Defendant, Ms. Glenn, and Ms. Glenn's partner appeared in court in James City County, Virginia, in order for Defendant to voluntarily "sign over his parental rights" so that Ms. Glenn's partner could formally adopt the child. The exact outcome of this court proceeding is unknown, as the appellate record in this case does not contain a copy of the Virginia court order. In 2014, Ms. Glenn moved with the child to California, and soon thereafter begin receiving public assistance from the state. Defendant was residing in Norlina, North Carolina at the time.

¶ 4 In March 2019, the Warren County Department of Social Services in North Carolina ("DSS") filed an action in Warren County District Court alleging that Defendant was the father of the minor child and that he was obligated to pay child support. Defendant filed an Answer, contending that he was under no obligation to pay child support. A hearing was held on the matter on 10 July 2020 in Warren County District Court. During the hearing, Defendant's counsel argued that this matter should be governed by the law of Virginia, where the child had been conceived and born. Defendant's counsel explained that under a Virginia statute,[2]

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1. The record does not specify whether the artificial insemination occurred with the help of a physician or medical facility, or whether instead the parties conducted the insemination privately with no physician assistance. On remand, this matter should be investigated by the trial court, as it may be dispositive in determining whether Defendant qualifies as a legal parent under Virginia law. *See, e.g.*, *Bruce v. Boardwine*, 64 Va. App. 623, 628-31, 770 S.E.2d 774, 776-77 (2015) (holding that the Virginia Assisted Conception Statute was inapplicable where the child was conceived through an at-home "turkey baster insemination" with no physician or medical facility involved).

2. Va. Code Ann. § 20-158 provides that "[a] donor is not the parent of a child conceived through assisted conception, unless the donor is the spouse of the gestational mother." Va. Code Ann. § 20-158(A)(3) (2019).

a sperm donor does not legally qualify as a parent, and thus Defendant did not owe any child support under Virginia law. Counsel for DSS disagreed, arguing that under the full faith and credit doctrine, the trial court was under no obligation to apply Virginia law, and that the law of North Carolina should apply as a matter of public policy.

¶ 5 The trial court issued an order on 24 August 2020 adjudicating Defendant to be the biological father of the child and ordering him to (1) pay $13,642.75 in past due child support; (2) obtain medical insurance for the child; and (3) pay $50.00 in monthly child support thereafter. Regarding the choice of law issue, the trial court concluded as follows:

> (4) The Court finds from the testimony and argument that, while the child was born in the Commonwealth of Virginia, and that there is a Virginia statute defining paternity, the Virginia paternity statute is not controlling in this action, which was brought pursuant to North Carolina statutes regarding the establishment of paternity and payment of child support.
>
> (5) The Court finds from the testimony and arguments that there is no known provision in current North Carolina statutory or case law which provides an exception or alternative to establishing paternity in this case and entering an order that the father of the child pay child support as calculated by the North Carolina Child Support Guidelines.

Defendant submitted a timely notice of appeal on 10 September 2020.

II. Analysis

¶ 6 On appeal, Defendant argues that the trial court erred in adjudicating him to be the father of the child and in ordering him to pay child support. Defendant contends that the trial court should have applied the law of Virginia, rather than the law of North Carolina, in making its paternity determination. We agree with Defendant that the trial court erred in applying North Carolina law, and remand for a new proceeding.

A. Choice of Law vs. Full Faith and Credit

¶ 7 We first address the applicable principles of law. Defendant, DSS, and the trial court all apparently agreed that the full faith and credit doctrine was dispositive in determining whether Virginia law should be applied. The parties are mistaken on this point.

¶ 8 The full faith and credit clause of the United States Constitution provides that "Full Faith and Credit shall be given in each State to public Acts, Records, and judicial Proceedings of every other State." U.S. Const. art. IV, § 1. This provision has been interpreted to mean that "the judgment of a state court should have the same credit, validity, and effect, in every other court of the United States, which it had in the state where it was pronounced." *Freeman v. Pac. Life Ins. Co.*, 156 N.C. App. 583, 586, 577 S.E.2d 184, 186 (2003) (internal marks and citation omitted). In other words, the doctrine requires that a "foreign judgment be given the same force and effect it enjoys in the state where it was rendered." *Id.* For example, North Carolina will provide full faith and credit to "[a] paternity determination made by another state" when such a determination is made "(1) [i]n accordance with the laws of that state, and (2) [b]y any means that is recognized in that state as establishing paternity[.]" N.C. Gen. Stat. § 110-132.1 (2019).

¶ 9 However, the full faith and credit doctrine is inapplicable here because this case does not involve an existing judgment or order from another state. Based on the record, it does not appear that the minor child here has ever been the subject of any previous paternity or child support order, and thus there is no foreign order for us to credit. Rather, this case involves determining the paternity of a child who was conceived (via artificial insemination) and born in Virginia, but who is the subject of a child support action in North Carolina. The issue before us thus becomes whether we should apply the substantive law of Virginia or North Carolina in adjudicating this paternity claim.

¶ 10 When a court is faced with a situation such as this—litigation that features significant ties to multiple states, each of which has conflicting substantive laws—the court must engage in a choice of law analysis to determine which state's laws should be applied to the claims raised in the suit. *See Boudreau v. Baughman*, 322 N.C. 331, 333, 368 S.E.2d 849, 852 (1988). Because the application of "conflict of law rules is a legal conclusion," we conduct a *de novo* review of the trial court's decision to apply North Carolina law. *Harco Nat. Ins. Co. v. Grant Thornton LLP*, 206 N.C. App. 687, 694, 698 S.E.2d 719, 724 (2010).

B. Selecting the Proper Choice of Law Test

¶ 11 In determining which state's laws apply to a given matter, there are two primary choice of law doctrines that a court may choose from. The most "traditional" conflict of law doctrine in North Carolina is *lex loci*, which provides that "matters affecting the substantial rights of the parties are determined by *lex loci*, the law of the situs of the claim."

Boudreau, 322 N.C. at 335, 368 S.E.2d at 853-54. In contrast, the *lex fori* test provides that "remedial or procedural rights are determined by *lex fori*, the law of the forum," i.e., North Carolina. *Id*. In other words, "[u]nder North Carolina choice of law rules, we apply the substantive law of the state where the cause of action accrued and the procedural rules of North Carolina." *Martin Marietta Materials, Inc. v. Bondhu, LLC*, 241 N.C. App. 81, 83, 772 S.E.2d 143, 145 (2015) (internal marks and citation omitted). For example, *lex fori* will govern the technical and procedural matters involved in any lawsuit, such as "determining the [applicable] statute of limitations," *Stetser v. TAP Pharm. Prod., Inc.*, 165 N.C. App. 1, 16, 598 S.E.2d 570, 581 (2004), or determining "the applicable burden of proof," *Taylor v. Abernethy*, 174 N.C. App. 93, 103, 620 S.E.2d 242, 249 (2005).

¶ 12 On the other hand, *lex loci* will be applied when determining substantive matters, such as what causes of action are available to a plaintiff or what damages a plaintiff may recover. *Stetser*, 165 N.C. App. at 16, 598 S.E.2d at 581. *Lex loci* has traditionally been applied in cases "involving tort or tort-like claims." *SciGrip, Inc. v. Osae*, 373 N.C. 409, 420, 838 S.E.2d 334, 343 (2020). *See also Gbye v. Gbye*, 130 N.C. App. 585, 587, 503 S.E.2d 434, 436 (1998) (recognizing that our state courts maintain a "strong adherence to the traditional application of the *lex loci deliciti* doctrine when choice of law issues arise"). *Lex loci* has previously been used to adjudicate wrongful death claims, trade secret claims, alienation of affection claims, and breach of contract claims. *See Gbye*, 130 N.C. App. at 585, 503 S.E.2d at 434 (wrongful death); *SciGrip*, 373 N.C. at 421, 838 S.E.2d at 344 (trade secrets); *Jones v. Skelley*, 195 N.C. App. 500, 505, 673 S.E.2d 385, 389 (2009) (alienation of affection); *Tennessee Carolina Transp., Inc. v. Strick Corp.*, 283 N.C. 423, 440, 196 S.E.2d 711, 722 (1973) (breach of contract).

¶ 13 Here, the question becomes whether the present action is governed by the *lex loci* test or the *lex fori* test—in other words, does a paternity statute qualify as a procedural or substantive law? We conclude that a paternity law is substantive in nature and thus that the *lex loci* test should be applied. A "substantial right" has been defined by this Court as "a legal right affecting or involving a matter of substance as distinguished from matters of form: a right materially affecting those interests which a person is entitled to have preserved and protected by law." *Bluebird Corp. v. Aubin*, 188 N.C. App. 671, 677-78, 657 S.E.2d 55, 61 (2008) (internal marks and citation omitted). A law that formally adjudicates a person's status as a parent (or non-parent) of a child meets this definition, as parenthood is one of the most fundamental protected

rights in our entire legal system. We accordingly conclude that the *lex loci* test should be applied to determine which state's paternity law governs this dispute.

C. Applying *Lex Loci*

¶ 14 The *lex loci* test states that the rights of the parties are governed by "the law of the situs of the claim." *Boudreau*, 322 N.C. at 335, 368 S.E.2d at 854. This Court has not previously had occasion to address what qualifies as "the situs of the claim" when the claim in question is a paternity claim or child support claim. In a tort-based action, *lex loci* instructs that we should apply "the substantive law of the state where the injury or harm was sustained or suffered, which is, ordinarily, the state where the last event necessary to make the actor liable or the last event required to constitute the tort takes place." *SciGrip*, 373 N.C. at 420, 838 S.E.2d at 343 (internal marks and citation omitted). In a contract-based action, *lex loci* states that "the law of the place where the contract is executed governs the validity of the contract." *Morton v. Morton*, 76 N.C. App. 295, 298, 332 S.E.2d 736, 738 (1985).

¶ 15 Under the unique circumstances of the present case, we conclude that the proper "situs of the claim" of the parties' paternity dispute is Virginia. Here, Virginia is the state where Defendant and Ms. Glenn entered into a "verbal contract" regarding the artificial insemination; Virginia is where the artificial insemination occurred; Virginia is where Ms. Glenn lived during the entirety of her pregnancy; Virginia is where the child was born; and Virginia is where the mother and child lived together for the first several years of the child's life. Under the *lex loci* tort theory, Virginia thus qualifies as the state where "the last event necessary to make the actor liable" occurred, in that it was the state where Ms. Glenn was impregnated and gave birth. Under the *lex loci* contractual theory, Virginia also qualifies as the state where the contract was executed, in that it was the state where Ms. Glenn and Defendant entered into a "verbal contract" regarding the artificial insemination.

¶ 16 Moreover, this result is supported by persuasive caselaw from other jurisdictions. For example, in *In re Marriage of Adams*, 133 Ill. 2d 437, 447, 551 N.E.2d 635, 639 (1990), the Illinois Supreme Court concluded that Florida law (rather than Illinois law) should apply to a paternity and child support action for a child conceived via artificial insemination. There, a married woman living in Florida underwent artificial insemination at a medical clinic, in which she was "artificially inseminated with semen of a man other than her husband." *Id.* at 440, 551 N.E.2d at

636. The husband and wife continued to live together throughout her pregnancy, and the child was born in Florida. *Id.* The couple separated when the child was several months old, and the wife and child moved to Illinois, where she subsequently filed a petition for child support. *Id.* In his answer to the petition, the husband acknowledged that the child was born during the marriage but asserted that he was not the father because the child was conceived as a result of artificial insemination to which he did not consent. *Id.* at 441, 551 N.E.2d at 636. The trial court adjudicated the husband the legal father of the child under Illinois law. *Id.* at 442-43, 551 N.E.2d at 637.

¶ 17 On appeal, the Illinois Supreme Court recognized that the case presented a choice of law issue, because Illinois law provided that children conceived via artificial insemination to a married couple were presumed legitimate, whereas Florida law provided that such children were only legitimate if both the husband and wife had consented in writing to the artificial insemination. *Id.* at 443-44, 551 N.E.2d at 637-38. Applying Illinois choice of law rules, the Court held that the law of Florida should govern the paternity action because Florida had "the more significant relationship to the dispute." *Id.* at 447, 551 N.E.2d at 639. The Court found it relevant that "[the wife] was . . . inseminated in Florida, the Adamses were residents of Florida at that time and continued to live there during the course of the pregnancy, and the child was born in Florida." *Id.*

¶ 18 The Illinois Supreme Court concluded that "whether a parent-child relationship exists . . . as a result of [] artificial insemination should not depend on the laws of every State in which the family members may find themselves in the future." *Id.* The Court noted that this rule would best "fulfill the participants' expectations and [] help ensure predictability and uniformity of result," because the parties participating in an artificial insemination procedure will naturally "expect that their own local law will govern the relationships created by it." *Id. See also In re K.M.H.*, 285 Kan. 53, 56-62, 169 P.3d 1025, 1030-32 (2007) (holding that a paternity action for twins conceived via artificial insemination should be governed by the law of Kansas because the "original oral agreement with [the sperm donor] took place in Kansas; the parties reside in Kansas; the sperm resulting in the pregnancy was given to [the mother] by [the donor] in Kansas . . . [and] the twins were born in Kansas and reside in Kansas").

¶ 19 We agree with this approach. Under the *lex loci* doctrine, following the paternity laws of the state where the child is conceived not only fulfills the parties' natural expectations, but helps ensure predictable and equitable results. If we were to accept DSS's arguments—and hold that

a paternity action is simply governed by the laws of whichever state the plaintiff chooses to sue in—this would encourage forum-shopping, as a parent seeking a paternity determination could simply travel to whichever state has the most favorable laws. *See Hamdan v. Freitekh*, 271 N.C. App. 383, 386, 844 S.E.2d 338, 341 (2020) (noting that an important goal of child support and custody laws is "to prevent parents from forum shopping their child custody disputes and assure that these disputes are litigated in the state with which the child and the child's family have the closest connection") (internal marks and citation omitted). We cannot condone such a result, and instead conclude that, under our state's choice of law principles, we must follow the paternity law of the state where the insemination and conception occurred.[3] Because that state here is Virginia, the trial court erred in applying North Carolina law to this matter.

III. Conclusion

¶ 20 Because this matter was decided in the trial court under the inappropriate law, and because the parties have not had an opportunity to brief and argue the relevant issues under Virginia law,[4] we reverse the trial court's order and remand for further proceedings consistent with this opinion.

REVERSED AND REMANDED.

Judges DIETZ and COLLINS concur.

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3. However, we emphasize that no single factor is dispositive in determining which state qualifies as the "situs of the claim" for a paternity action under the *lex loci* theory. This analysis is highly fact-based and individualized and must be carefully considered under the unique circumstances of each case.

4. We make no comment on the ultimate outcome of this matter under Virginia law—it is the role of the trial court to determine on remand whether Defendant qualifies as the child's legal parent under the applicable Virginia law.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(FILED 15 JUNE 2021)

AZEVEDO v. ONSLOW CNTY. DEP'T OF SOC. SERVS. 2021-NCCOA-276 No. 20-526	Onslow (19JRI2)	Remanded
BELCHER v. N.C. DEP'T OF PUB. SAFETY 2021-NCCOA-277 No. 20-562	Office of Admin. Hearings (19OSP05603)	Reversed and Remanded
BRANCH BANKING & TR. CO. v. SUNTRUST BANK 2021-NCCOA-278 No. 20-707	Mecklenburg (16CVS15658)	Affirmed
HEWETT v. CAROLINA TRACTOR & EQUIP. CO. 2021-NCCOA-279 No. 20-659	N.C. Industrial Commission (18-728785)	Dismissed
IN RE J.F. 2021-NCCOA-281 No. 20-231	Gaston (17JA342) (17JA343)	Affirmed in Part, Reversed in Part and Remanded
IN RE L.M. 2021-NCCOA-282 No. 20-516	Gaston (19JA138) (19JA139)	Affirmed
LAWING v. MILLER 2021-NCCOA-283 No. 20-492	Guilford (18CVS1024)	Affirmed in part, Vacated in part and Remanded
SCHAEFFER v. SINGLECARE HOLDINGS, LLC 2021-NCCOA-284 No. 20-427	Orange (19CVS810)	Reversed
STATE v. BYRD 2021-NCCOA-285 No. 20-361	Harnett (02CRS52697)	Affirmed
STATE v. CATHCART 2021-NCCOA-286 No. 20-872	Mecklenburg (14CRS237227)	Affirmed.
STATE v. DOUGLAS 2021-NCCOA-287 No. 20-214	Cumberland (99CRS1543)	Vacated and remanded for resentencing.

STATE v. LITTLE 2021-NCCOA-288 No. 20-690	Guilford (18CRS81022-23)	New Trial
STATE v. SOUTHERN 2021-NCCOA-289 No. 20-433	Surry (18CRS531-532)	No error in part; dismissed in part.
STATE v. TILLMAN 2021-NCCOA-290 No. 20-734	Lee (19CRS134)	Dismissed
STATE v. TIRADO 2021-NCCOA-291 No. 20-213	Cumberland (98CRS34831)	Affirmed
STATE v. WILLIAMS 2021-NCCOA-292 No. 20-432	Iredell (15CRS56346-49) (18CRS55457)	No Error
WILSON v. SWEELY 2021-NCCOA-293 No. 20-682	Stanly (19CVD244)	Vacated and Remanded

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